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THE PRINCIPLE IN WEISZ'S CASE

by

S. VENKATARAMAN.

The decision in *Weisz's case*[1] is of great value even outside the country where it was rendered. It breaks new ground. It brings to light a new aspect of the law of contempt. It holds that disguising a cause of action so as to conceal its true nature from the Court is a contempt of Court. Hactor, Macdonald and Co. were a firm of book-makers. Weisz claimed that a sum of £ 380 was due from them to him in respect of bets laid with them. The company denied liability. Tattersall's Committee, the recognised tribunal in England for settling disputes arising out of betting decided in favour of the company. Thereupon Weisz consulted Martin, a solicitor of the firm of Campbell Hooper and Todd, with a view to bring an action for the recovery of the amount from the book-makers. Martin advised that the action was not maintainable at law. Weisz was however insistent about bringing the action. He hoped that the threat of publicity would induce the book-makers to pay. Even if they did not, he wanted " to show them up ". Martin was reluctant to offend his client by declining to act. So he sent the correspondence to counsel with instructions to settle the endorsement for the writ. On receipt of the endorsement, Martin sent a letter to the book-makers on 18th January, 1951, in the name of the solicitor's firm stating that the firm had been instructed, and as it appeared to be of no use to request payment of the amount, were issuing a writ and asked for the name of their solicitor for acceptance of service. The book-makers did not send any reply. Martin had a writ issued and served on the book-makers. The endorsement ran :

" The plaintiff's claim is for the sum of £ 373-13-4, being the balance found to be due from the defendant to the plaintiff on accounts stated between them in writing and contained in a letter from the plaintiff to the defendant of September 26, 1950. Particulars. 1950 September 26. Balance due by defendant to plaintiff on this date £ 373-13-4.

(*Sd.*) Campbell, Hooper and Todd."

The book-makers applied immediately through their solicitors on 29th January, 1951, for particulars of the claim. Martin's firm wrote back that they would be sent as soon as they were received from counsel. Shortly afterwards the particulars were in fact received from counsel. The particulars did not attempt to conceal or disguise the nature of the claim and disclosed that the debt related to betting transactions. Counsel had also intimated his opinion that the particulars were fatal to Weisz's claim and would lead to their being struck out by the Court. Counsel

1. *R.* v. *Weisz* (1951) 2 All E.R. 408.

had added : "Mr. Weisz probably knows this as well as a lawyer". The particulars thus received were not however sent by Martin's firm to the defendant's solicitors ; and after some time, on February 26, the defendant's solicitor issued and served a summons of application asking for particulars returnable on 7th March. On 6th March, notice of discontinuance of the claim was served. Thereupon an application charging Weisz and Martin with contempt of Court was taken out.

The Gaming Act of 1845 (8 and 9 Victoria, ch. 9) prohibits actions for recovery of moneys alleged to be won on bets. In *Phillips* v. *Copping*[1], it was decided that if *A* sues *B* for money won at betting it is the duty of the Court to refuse to give judgment for him as soon as it appears that the action is one prohibited by the Gaming Acts, whether or not the Acts had been pleaded. There were, however, a number of occasions when resort had been had to the type of endorsement used in *Weisz's case*, for the recovery of moneys won at betting and no objection to such a practice had been taken. Certain things are however clear. If the action was not contested by the defendant as often happened for fear of publicity, the plaintiff would have got off with it. If the writ had been truthfully endorsed for money won at betting, it would be wholly improper to allow a default judgment to be entered. The difficulty was therefore sought to be surmounted by disguising the character of the claim. There can be no doubt that to countenance such a practice would be altogether mischievous in its results. The policy implicit in the legislation as to gaming that the Courts ought not to be used for recovery of amounts won at betting or gaming would be circumvented and altogether defeated. These considerations notwithstanding, such a practice had in fact obtained and without objection being taken. The decision in *Gugenheim* v. *Ladbroke & Co. Ltd.*[2], adverts to it. In that case, the plaintiff was a person who had made bets in England with the defendants, a firm of book-makers. He claimed that £ 8784 was due to him in respect of those transactions. The defendants had refused to pay on the ground that the plaintiff's name had been reported to the Jockey Club as a defaulter on bets and he had been warned off the course. There were, according to the plaintiff, some negotiations between the parties, as a result of which, he said, the defendants had agreed that a sum of £ 7256 was due to him from them. The plaintiff sued for the recovery of the amount, founding his action on an account stated. It was contended on behalf of the defendants that the action ought to be struck out as frivolous and vexatious and that an action on an account stated which was an account of cross claims in respect of gambling debts was so obviously an account which cannot be sued on in a Court of law that the action should be summarily dismissed. The plaintiff was a foreigner not conversant whith the attitude of English law towards matters of this kind. Lawrence, L.J., held that in view of the numerous cases where amounts really due on betting transactions had been disguised as causes on account stated without objection being raised, the striking off would not be justified. The Lord Justice observed : "The real question which the Court has to decide is whether the rule as to striking out actions which are frivolous and vexatious ought to be applied in this case, and, in my opinion, having regard to the numerous cases which have been decided on betting transactions and agreement which are allowed to have been made and to be legal arising out of betting transactions, this is not the class of case which ought to be struck out as being frivolous or vaxatious". Tucker, L.J., concurred having regard to the practice referred to and the foreign nationality of the plaintiff. He said : "This is an action brought by a foreign plaintiff against the company trading in this country. Denning, J., and Lawrence, L.J., both think that he should not be driven from the judgment seat before his case had been heard. I make no secret of the fact that I should have come to a different conclusion, but as I think it most undesirable with that amount of judicial difference of opinion, that a plaintiff, especially a foreign plaintiff should not be allowed to bring his case to trial. I am not prepared to dissent from the order suggested by Lawrence, L.J." In *Weisz's case*, Lord Goddard,

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1. (1935) 1 K.B. 15.

2. (1947) 1 All E.R. 292 (C.A.).

C.J., thought that the aforementioned special circumstances must be taken into account in reading the conclusions in *Gugenheim's case*[1] and that the decision ought not to be taken as sanctioning an endorsement which disguises the cause of action so as to conceal its true nature from the Court. The learned Chief Justice observed : "There are many cases to be found in the books in which this endorsement has been used in betting cases and so far there has been at least no reported case in which it has been suggested that such a thing is a contempt, though the actions have been struck out as an abuse of process. Indeed in *Gugenheim* v. *Ladbroke & Co., Ltd.*[1], the Court of Appeal allowed the action to proceed apparently on the ground that the plaintiff was a foreigner who would, they thought, not understand the position and be aggrieved if the action were to be summarily dismissed. , . . . I think that case should be regarded as wholly exceptional. It does appear from its subsequent history, that a very serious issue of fraud had been raised which the foreign plaintiff was anxious to have determined and when the case came for trial before Humphreys, J., the Judge allowed the issue to be left to the jury though he entered judgment for the plaintiff on the ground that it was a betting claim and without regard to the verdict". After thus distinguishing and explaining away the conclusion in *Gugenheim's case*, the learned Chief Justice went on to state : "The very fact that on many occasions resort has been had to this particular form of endorsement in cases which are brought simply for the recovery of money won at betting or gaming is what gives importance to the present motion. It is time that this practice should be stopped and in no uncertain manner".

As to whether the practice amounts to contempt of Court, early decisions afford a pointer in that direction though there is no case where the matter had come up for decision directly. *Coxe* v. *Phillips*[2], was a case of "fob action to learn the opinion of the Court" on a particular question. In that case, the defendant a woman had married one Muilman, a London merchant. She was at that time already married and that marriage was subsisting. The marriage with Muilman was on that account declared to be null and void by the Spiritual Court. Sometime later, Muilman took another wife. Thereafter the defendant Phillips filed a suit in the Eccleciastical Court to abrogate the nullity decree on the ground that the man to whom she had been originally married had himself a wife alive at that time and was living with her, so much so her marriage with him was not valid and she was therefore in a position to contract a valid marriage with Muilman. During the pendency of this suit one Coxe brought a suit against the defendant Phillips on a promissory note executed by her seeking recovery of the amount alleged to be due thereunder. Phillips pleaded her marriage with Muilman in answer to the claim against her. On Coxe replying that her marriage with Muilman was not valid and therefore cannot be pleaded, she rejoined it was good as her original marriage was not a valid marriage. Muilman intervened and contended that Coxe's action was a put up affair, that it was a fictitious suit connived between him and the defendant Phillips with a view to burden Muilman with liabilities and to impose on the Court. The connivance was found to be true. Lord Hardwicke, C.J., observed : "Now this is a mere fictitious action, not to determine a right or controversy, but to deceive the Court, and raise an evil fame of Muilman ; and surely that cannot be said to be of no offence. That such practices are not lawful is plain . . . . and I cannot see how there can be a stronger instance than the present ; and it is incumbent on Courts of Justice to keep the streams of justice clear or they will be made use of as means of scandal. . . . . . . Upon the whole matter the Court thought this a contempt, even though the action were upon a real demand ; because it had been made an ill use of and therefore ordered that the plaintiff and defendant and one Hudson who was the acting Attorney for both should stand committed." The decision establishes that to bring an action in deceit of the Court will be contempt. Another case which throws light on the question is *Re Elsam*[3]. Elsam was an attorney and he had a special case stated for the opinion

1. (1947) 1 All E.R. 292 (C.A.).
2. (1736) Lee temp. Hard 237 : 95 E.R. 152.
3. (1824) 3 B. & C. 597 : 107 E.R. 855.

of the Court. A great part of the statement was however fictitious. Abbot, C.J., said : " It is impossible to pass over a case of this kind without notice but as it appears that the party before the Court did not intend any fraud, and that he has already incurred an expense of £ 40 in the course of these proceedings, the object of the Court which is to prevent the repetition of such a practice in future, will be answered by ordering him to pay a fine of £40 and to be imprisoned till that fine be paid ". It is thus clear that even if no fraud against the Court was meant, it would still amount to contempt if the action was fictitious. Good faith will hardly serve as an excuse in such a case. In *Lindwood* v. *Andrews*[1], a barrister appearing for the defendant in an action was found to have wilfully deceived the Court by procuring the party to make an affidavit he knew to be untrue and reading it to the Court. It was held that it was an abuse of process and was punishable as contempt. Here, it was counsel that was acting contrary to the code of conduct expected of him and not the party. The intention to deceive was also found. Also, the suit was not one disguising the cause of action.

In *Weisz's case*, it was found by the Court that there was no intention to deceive the Court and that the true nature of the claim was disguised as it was one prohibited by the statute. Still inasmuch as the action was on a feigned issue so as to hide from the Court the true nature of the action it amounted to contempt. Lord Goddard, C.J., observed : " It is necessary to emphasise that the contempt in the present case lies, not in bringing an action forbidden by the Gaming Acts, but in bringing it as a feigned issue so as to conceal its true nature from the Court. . . . . . Had the writ been endorsed for moneys due to the plaintiff on bets won by him the action would have been struck out, but it would not have amounted to contempt ". His Lordship added finally : " We hope . . . . that counsel as well as solicitors will always bear in mind that they owe a duty to the Court as well as to their clients, and that a main object in requiring the signature of a counsel or solicitor to pleadings settled by them is to prevent issues, whether called feigned or fictitious being presented to the Court ".

Contempt of Court is essentially a foreign concept. It came to India with the British. The exposition in *Weisz's case* has thus value not merely in the United Kingdom but in our country as well.

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1. (1888) 58 L.T. 612.

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THE MADRAS LAW JOURNAL.

I] MARCH [1952

ELECTION OF THE LEGISLATIVE COUNCIL

BY

T. R. VENKATARAMA SASTRI

I here set out the full material bearing on the question.

Election to the Council is held under Article 171.

The members of Council are both elected and nominated,

(a) One third to be elected by the local bodies,

(b) One twelfth by graduates,

(c) One twelfth by educationists,

(d) One third by "members of the Legislative Assembly",

(e) The rest to be nominated by the Governor.

The important question raised is whether the members elected to the Legislative Assembly can elect their one third to the Council without taking the oath under Article 188. My conclusion is that they may elect before taking the oath under Article 188. I considered Article 193 to prescribe penalties for taking part in the conduct of business within the House. It has been pointed out to me that Article 193 in its wording applies to every voting as a member of the Assembly which, voting for Council under Article 171 certainly is.

Such construction has serious difficulties. Take first, the language of the oath or declaration :

> "..............I will faithfully discharge
> the duty *upon which I am about to enter.*"

Just before taking seat and taking part in business, this oath is taken. The next Article 189 prescribes the mode of voting in the House, members sitting together. Article 176 says:

> "At the commencement of every session the Governor shall address the Legislative Assembly....or where both Houses exist both assembled together."

Though that Article has been modified, that was in the original Constitution and the construction must be in the light of that provision. Session is defined by Article 174 as the sitting of the Houses on

summons by the Governor. It is at the first meeting of the elected members on summons that oath is taken. If they take the oath just before sitting in the Assembly and Council at that first summons, how can there be a Council at that first summons at which the Assembly is to take the oath. The Council must have come into existence before the members of the Assembly took the oath. The members of the Assembly are such before taking the oath (see language of Article 188) and have already elected the Council and both Assembly and Council are ready to be called under Article 174 after which they take the oath. Now take Article 193.

> "If a person sits or votes as a member of the Legislative Assembly or Legislative Council.........."

The marginal note is 'sitting *and* voting.' The section uses sits *or* votes for a reason which may be given whether that was present or not to the mind of the Constituent Assembly. Suppose a member does not sit but rushes in when vote is taken. He really sits and votes. The word 'sit' suggests sessions at which a member functions under Article 189.

One may put the question whether the Constituent Assembly could not have said in Article 171 as in the oath 'members elected to the Assembly' but then he may have become disqualified, say, by insolvency or he might have chosen membership under another election and so given up a membership to which also he was elected. The election to the Assembly is not sufficient but the membership must be a continuing one on the date of election under Article 171.

Though the language of Article 193 might suggest a wider construction it ought to be construed in the light of other Articles that I have referred to and in the light of the indication of the marginal note to apply to the conduct of business within the House.

Election under Article 171 is not, in my opinion, intended to be subjected to Article 193 except when he votes after disqualification. To that extent I modify my opinion.

I do not say that the language of Article 171 was incapable of being expressed more precisely. It all comes to saying by way of explanation that the members of the Assembly in Article 171 (3) (d) are those elected and not disqualified subsequently under Article 191. There is another point suggested that taking oath may precede summons under Article 174. There is no provision for summons to elected members merely for taking oath. The legislation proceeds on a well-established practice and a construction which can be maintained only by ignoring such practice must be supported by something more explicit than anything that exists. Here again the language of the oath indicates that the oath is taken at the first session of the Houses by members of both Houses.

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AFTER-BORN COPARCENERS AND ANTECEDENT ALIENATIONS UNDER THE MITAKSHARA SCHOOL.

By

S. VAIDYANATHAN, ADVOCATE.

There is much uncertainty even at the present day regarding the true nature and precise extent of the rights of an after-born Mitakshara coparcener in joint family property which had been alienated antecedent to his birth by the father or other manager of the family. In the latest edition of Mayne's Hindu Law, published in 1950, it is stated at page 500 (para 398) that doubts as regards his rights must be taken to have been set at rest by the decision of the Privy Council in *Akhara Udasi Nirwani* v. *Surajpal Singh*[1]. With great respect, however, it is submitted that if the actual decision is examined closely in the light of the facts of the case, it will be found that far from settling any of the doubtful points which have been the subject of much debate, their Lordships' pronouncement has unfortunately introduced further complications and uncertainties in the law on this topic. Shorn of immaterial details the facts in *Akhara Udasi Nirwani* v. *Surajpal Singh*[1], were these: One *S*, a Mitakshara Hindu executed a deed of simple mortgage in 1920 in favour of the appellant before the Board securing repayment of a certain sum of money. On that date the hypotheca was held in coparcenary by the mortgagor and his minor son, hereinafter referred to as the eldest son, then aged about two years. Subsequently three other sons, defendants 4 to 6 in the suit out of which the appeal arose, were born to the mortgagor. It is important to note that the eldest son died in the year 1923 at a time when the 4th defendant was a child aged about seven months. Defendants 5 and 6 were born only some years after the death of the eldest son. The mortgagee sued in 1933 on the mortgage of 1920, and sought to enforce the charge against all the members of the family including the interests of defendants 4 to 6. On the date of the suit they were still minors. Defendant 5 died during the pendency of the suit. Defendants 4 and 6 were the principal contesting respondents before their Lordships' Board, on this portion of the case. They denied liability under the suit mortgage on the ground that the debt secured thereby was incurred for purposes not binding on them. Plaintiff met this objection by contending

(*a*) that the defendants 4 and 6 who were not in existence on the date of the mortgage have no *locus standi* to contest the validity of the said alienation as against them;

(*b*) that in any view, the mortgage was binding on them as an alienation by their father for discharge of his antecedent debts. Their Lordships overruled both these contentions. The discussion by their Lordships on the first point is, unfortunately, not as full or as clear as it might well have been, with the result that several difficult questions with which the problem bristles are left unanswered without an authoritative elucidation of the legal principles applicable to the solution of this and similar problems. The whole reasoning on which their Lordships base their conclusion on this point is to be found in the following brief passage in the Judgment delivered by Lord Porter:

"In support of the former proposition it is asserted that a member of a joint family must be content with the family estate as he finds it at his birth, or at any

1. (1944) 2 M.L.J. 395 (P.C.).

rate, he cannot complain of anything done before the period of gestation. Upon this rule it is admitted there is engrafted an exception to the effect that if the child who objects to the alienation of the property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before the alienation; then that overlapping of the two lives enables the later-born child to contest the validity of the father's act."

Then after adverting to the evidence in the case, his Lordship concludes thus:

". . . . . Their Lordships like the High Court think it sufficiently established that the first born son did not die until after the birth of a younger brother and hold that the minor sons are entitled to challenge the validity of the mortgage." No arguments appear to have been addressed to their Lordships and therefore there is no considered discussion by them on the following questions which arise :

(1) Whether each of the after-born sons in the position of defendants 4 to 6 acquires an independent and individual right to the alienated property from the moment of their births, irrespective of the presence or absence on the date of the alienation of other co-parceners besides the alienor?

(2) Are the rights, if any, of such after-born coparceners limited to those of participating in the benefits accruing to the other coparceners who were alive on the date of the alienation by their successful reisistance of the claims of the alienee against the family?

(3) If their rights are so limited, are they further curtailed or lost to them (*viz*., the after-born coparceners) by the subsequent death of the non-alienating coparceners who were alive at the date of the alienation, without their either affirming or challenging the alienation?

(4) Can the benefit of the principle of "overlapping of the two lives" assumed by their Lordships to be accurate, be extended in favour of and made available to an after-born coparcener in the position of the 6th defendant, who admittedly was conceived and born after the death of the eldest son? or

Is the benefit of the said principle limited only to a coparcener like the 4th defendant? In other words, what is the precise extent and duration of the "overlapping? Is it only an overlapping occurring by the births of new coparceners during the lifetime of the coparcener who was alive at the alienation, or is it also an overlapping that takes place by such subsequent births, even after the death of the non-alienating coparcener alive at the alienation, but during the lives of new-born coparceners coming into existence in the lifetime of the one who was in existence at the time of alienation that takes the case out of the general rule also assumed by their Lordships to be correct that every coparcener acquires on his birth an interest in the family properties as they exist at the time of his birth. Expanding the same idea : Does a coparcener in the position of the 6th defendant answer the description as "a child coming into existence after the alienation but during the life of a child born or conceived before the alienation"? Is it not more appropriate to describe him though the description has necessarily to be cumbruous and hence irrelevant—as a "child coming into existence after the alienation, but during the life of another child also born after the alienation, but before the death of the child in existence at the date of the alienation." On the facts of the case, before their Lordships there was clearly a hiatus or interval of time exceeding the ordinary period of gestation, between the death of the eldest son and the birth of defendants 5 and 6. Does not this circumstance make a vital difference between the 4th defendant on the one hand and the defendants 5 and 6 on the other, as regards their respective rights to attack or resist the alienation? Is the 'gap' effectively bridged by the intervention of the life of the 4th defendant during the interval between the death of the eldest son and the birth of defendants 5 and 6 notwithstanding the fact that the 4th defendant himself is a child born only after the alienation?

(5) Does the principle of "overlapping" continue to operate even after the "overlapping of the two lives" has ceased by the death of the non-alienating

coparcener who was in existence at the alienation? In other words (and this is again question No. (3) above from slightly a different aspect)—

Is a coparcener in the position of the 6th defendant competent in his own right to contest the validity of the mortgage, even after the death of the coparcener who was alive at the time of the alienation and had not assented to it?

The attention of their Lordships does not appear to have been drawn to their own previous pronouncements, nor to the numerous, if also conflicting decisions of the Indian High Courts, (for a complete collection of them—see the Full Bench decision of the Nagpur High Court in *Kashinath* v. *Bapu Rao*[1],) on the questions formulated above.

To arrive at a correct assessment of the value of their Lordships' decision in *Akhara Udasi Nirwani's case*[2], as a binding precedent, it may be fruitful to examine in some detail the full implications of each of the questions propounded above in the light of the principles settled by the earlier authorities and then to see whether these principles require any, and if so, what modifications, in view of their Lordships' pronouncement in the instant case.

(1) The following passage from Mayne furnishes a convenient starting point for the discussion :

"A son or other coparcener cannot object to alienations validly made by his father or other manager before he was born or begotten, because he could only by birth obtain an interest in the property which had not validly passed out of the family before he comes into legal existence. Hence, if at the time of the alienation there had been no one in existence whose assent was necessary or if those who were in existence had consented, he could not afterwards object on the ground that there was no necessity for the transaction." (Mayne's "Hindu Law", 11th Edition, para 398, pages 498-499). See also *Chuttan Lal* v. *Kallu*[3], *Bholanath* v. *Kartick*[4]; *Narain Das* v. *Har Dyal*[5] and the other cases cited under foot-notes (v), (w) of page 499.

Subject to some doubts and differences of opinion as to the meaning and import of the word "validly" occurring in two places in the above extract, this has always been treated as an accurate statement of the law, so far as it goes. But it is not and does not purport to be a complete or comprehensive statement of the law in all its aspects. The decision in *Lachmi Narain Prasad* v. *Kishan Kishore Chand*[6], recognises at least one other contingency—*viz*., the inaction of the coparcener in existence at the time of the alienation for over the statutory period in not challenging the transaction basides the two specifically mentioned by Mayne in the above passage, as precluding a later born coparcener, from objecting to the alienation. This view equates the failure on the part of the members of the family in existence on the date of the alienation, to set it aside in time with their express consent to it and both are equally effective in removing the property from the family. A coparcener born after the removal of the property from the family by such express consent or passive inaction for over the statutory period, on the part of those in existence at the time of the alienation acquires no rights whatever in the alienated property. It will not be correct to read the above passage in Mayne as laying down by implication the proposition that in all other situations except the two contingencies mentioned in the second sentence of the said passage, *viz*., the non-existence of another coparcener besides the alienor at the date of the alienation or his assent to it if there was one such in existence on that date, a coparcener born after the alienation is in exactly the same position as if he had been in existence at the date of the alienation. Such a proposition will be too broad. On the other hand the preponderance of judicial opinion indicates the general rule to be :—"that a member of a joint family must be content with the family estate as he finds it at his birth

1. I.L.R. (1940) Nag. 573 (F.B.).
2. (1944) 2 M.L.J. 395 (P.C.).
3. (1910) I.L.R. 33 All. 283.
4. (1907) I.L.R. 34 Cal. 372.
5. (1913) I.L.R. 35 All. 571.
6. (1915) I.L.R. 38 All. 126.

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NOT TO BE REMOVED

or at any rate he cannot complain of anything done before the period of gestation ".[1] No doubt this rule is subject to some important exceptions considered below under question No. (2).

After enunciating an exception "admitted" presumably by Counsel, to be engrafted upon this rule, (as quoted above), their Lordships observe in *Akhara Udasi Nirwani's case*[1], that "they did not think it necessary to determine whether this limitation upon the right of an after-born child to resist the claim of an encumbrance upon the family estate correctly expresses the law in all respects" and "were content to assume its accuracy." Unfortunately, the language here is ambiguous. It is not quite clear whether it is the rule or the exception "engrafted upon it" or the composite proposition made up of the rule and exception read together, that is referred to as "this limitation upon the rights of an after-born child." The word "this" points to the immediately preceding proposition which states the exception. But it is very inapt to describe the exception as a "limitation of the rights or an after-born child." The exception extends, and enlarges, rather than limits the rights of the after-born child in certain special circumstances compendiously described as the "overlapping of the two lives." It may be, that all that their Lordships meant was that they were not giving a considered decision on the rights of an after-born son in general and in all their legal aspects, but were basing their conclusion on the assumption that the law was as stated by counsel. It is doubtful whether the decision of their Lordships given in such circumstances and with so much of cautious reservation, can be treated as having finally settled any of the vexed questions on this topic about which judicial opinion in India has been so sharply divided.[2]

(2) It is now fairly well settled that the coparceners in existence at the date of an alienation by the father or other member can either affirm the transaction at a later date or they may if they feel aggrieved by it challenge the same by instituting the appropriate suit within the period of limitation prescribed therefor. If they succeed in their challenge, the effect of it is that the property which went out of the family under the alienation is restored to it with the result that all those members of the family including those born into it subsequent to the alienation are entitled to the benefits of such success. In other words, the successful challengers who ex-hypothesi are the coparceners in existence at the date of the alienation are not entitled to appropriate to themselves the fruits of their victory to the exclusion of the other members of the family who were born subsequent to the alienation. This principle is implicit in the decision of the Privy Council in *Ram Kishore Kedar Nath* v. *Jainarain*[3], where the facts were these: The four sons of one Kedar Nath instituted the suit on 20th December, 1907, to set aside a disposition of part of their family properties in the year 1898 by their father in favour of the defendant Jainarain. The first plaintiff was born on 20th December, 1886. The other plaintiffs were born between 1892 and 1894. The court of appeal in India, held that so far as the first plaintiff was concerned his suit was in time, but that that it was barred as against his younger brothers who were born after the commencement of what was treated as the adverse possession of the defendant. Their Lordships, on appeal rejected this view in these words:

"It was however conceded before this Board, and as their Lordships think rightly conceded, that if the first plaintiff succeeds, his younger brothers born before a partition of the estate will be entitled to share in the relief.".

The decisions in *Tulshi Ram* v. *Babu*[4] and *Amrithalinga Thevan* v. *Arumugha Ambalagaran*[5] are also explained on this principle. These were cases where the alienee sought to enforce by suit his title under the alienation by one member of the family against not merely some or all the other members of the family who were in exis-

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1. *Akhara Udasi Nirwani* v. *Surajpal Singh*, (1944) 2 M.L.J. 395 (P.C.) at p. 397.
2. See for example two extreme and divergent views in I.L.R. (1943) Bom. 423 and (1940) I.L.R. 20 Patna 727.
3. (1913) 25 M.L.J. 512 : L.R. 40 I.A. 213 : I.L.R. 40 Cal. 966 (P.C.).
4. (1911) I.L.R. 33 All. 654.
5. (1928) 28 L.W. 634.

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tence at the date of the alienation and were not parties to it but also against other members born in the family subsequent to the alienation. It was held that such after-born members were not precluded from resisting by way of defence the validity of the alienation as against them also, even though they were not in existence at the date of the transaction sought to be enforced, the principle being that the coparcener who was in existence on the date of the alienation and who was made a co-defendant along with the after-born coparceners "defends not only in his own interests but in the interests of the family and therefore are (including the later-born ones) who were members of the family at the time of the successful defence benefited by such defences"[1]. The decisions in *Bhup Kunwar* v. *Balbir Sahai*[2], and *Chandramani Prushti* v. *Jambeswara Rayagaru*[3], do not however strictly fit in with this principle, but rest on a wider conception of the rights of an after-born coparcener. The former decision is founded on the extreme view that an after-born coparcener has got an individual and inherent right to resist an alienation made anterior to his birth and such a right is not dependent for its effective exercise on there being in existence a coparcener who was alive on the date of the alienation. In that case the non-alienating coparcener who was in existence on the date of the alienation sued for setting it aside, but died during the suit. When the alienee later sought to enforce by his own suit the alienation against a coparcener born after the alienation but during the pendency of the prior infructuous suit, it was held that such a later-born coparcener was not disentitled to contest the validity of the alienation. *Chandramani Prushti* v. *Jambeswara Rayagaru*[3], arose out of a simple mortgagee's suit for sale. On the date of the suit mortgages, the third defendant was a member of the joint family of the mortgagor. The second defendant was a son of the mortgagor and he was born after the execution of the mortgages sued on. The third defendant had previously instituted various legal proceedings for getting the suit mortgages invalidated in so far as they affected his interests, but he ultimately failed in those proceedings. He was therefore plainly barred by the rule of *res judicata* from contesting the validity of the suit mortgages in the later suit, and it was so held. The interest of the decision for our present purpose lies in this, that the learned Judges held that the second defendant though an after-born coparcener of the mortgagor was not disentiteld to contest the validity and binding nature of the mortgages, as against him stress being laid on the circumstances that on the date of the mortgages there was in existence a coparcener (*viz.*, the 3rd defendant) who had not consented to it. It is not clear whether the learned Judges would have reached the same conclusion even if the coparcener who was in existence at the date of the alienation was dead or had allowed his remedies for invalidating the same to be barred by lapse of time on the date when the subsequent born coparcener attacks or resists the transaction.

(3) It is not indubitably clear whether an after-born coparcener has any additional or other rights than those limited rights recognised by Courts like *Ram Kishore Kedarnath* v. *Jainarain*[4] and *Tulshi Ram* v. *Babu*[5]. It is from this point onwards that the case-law begins to disclose a bewildering conflict and the task of reconciling the many conflicting decisions and dicta and evolving from them a clear and consistent rule that will work in all situations is by no means easy. Before proceeding further, we may eliminate one case which on principle appears to be a plain one. Where the only non-alienating coparcener who was in existence at the date of the alienation dies subsequently and thereafter another coparcener is born in the family—after the usual period of gestation reckoned from the death of the first mentioned coparcener, it has been held that such a subsequently born coparcener acquires no rights whatever in the alienated property, not even the limited right of impugning the alienation. This was the actual decision in *Visweswara Rao* v. *Surya Rao*[6].

1. (1936) 70 M.L.J. 360, 372: I.L.R. 59 Mad. 667, 684.
2. (1921) I.L.R. 44 All. 190.
3. (1930) 34 L.W. 598: A.I.R. 1931 Mad. 550.
4. (1913) 25 M L.J. 512: L.R. 40 I.A. 213: I.L.R. 40 Cal. 966 (P.C.).
5. (1911) I.L.R. 33 All. 654.
6. (1935) 70 M.L.J. 360: I.L.R. 59 Mad. 667.

This conclusion accords with the theory that the cause of action for setting aside an alienation of family property is one that arises at the moment of the adverse alienation and abates with the death of those persons in whom such a cause of action was vested when it arose, that is the non-alienating coparceners who were in existence at the date of the alienation and is not revived by the birth of another coparcener after an interval of time exceeding the normal period of gestation computed from the death of the last survivor among such non-alienating coparceners. The discussion in *Visweswara Rao* v. *Surya Rao*[1], covers a much wider ground than was perhaps strictly necessary for the actual decision. But at the same time, the judgment of the Bench delivered by Stone, J., is valuable as containing an instructive exposition of the legal principles involved, besides furnishing an exhaustive anthology of the case-law on the subject.

It is a question of nicety whether the principle on which the decision in *Visweswara Rao* v. *Surya Rao*[1] is based can be extended to a situation where there is no "gap" separating the death of the non-alienating coparcener who was in existence at the date of the alienation, from the birth of a fresh coparcener, that is to a case where after the birth of a coparcener subsequent to the alienation, the coparcener who was alive at the alienation dies, leaving the later-born coparcener surviving him. If the correct principle is that the after-born coparcener has no independent cause of action apart from that vested in the non-alienating coparceners who were alive at the alienation, then the conclusion is irresistible that he has no right to impugn the alienation after the cause of action had become extinguished with the death of all those persons in whom it was vested when it arose even though the period of limitation reckoned from the date of the alienation has not run its course.

In *Ransdip Singh* v. *Parmeshwar Prasad*[2], the point is discussed from the aspect of the starting point of limitation for an action for setting aside an alienation such as that we have been considering. It was held that if the coparceners who were in existence on the date of the alienation allowed their rights to be barred by lapse of time, then the after-born coparcener was also equally barred even though the later-born coparcener might have been born before the expiry of the period of limitation prescribed for challenging the alienation. This necessarily implies not merely that the cause of action arises on the date of the alienation, but also that it vests in such of the other coparceners who were alive and not consenting thereto and in them only. It is interesting to note that in that case there was a clear "overlapping of lives" within the meaning of that phrase as used in *Akhara Udasi Nirwani* v. *Surajpal Singh*[3]. Nevertheless this circumstance was not considered by anybody concerned—Counsel or Judges—as of any significance and the decision went on the principle that the cause of action arose at the alienation and that the bar of limitation operating against a coparcener in existence at the time of alienation affects equally the subsequent born coparcener. It is worth quoting in this connection the following passage from *Visweswara Rao* v. *Surya Rao*[1].

"By parity of reasoning just as where the right of action possessed by the coparceners existing at the time of the alienation if barred is lost not only by them, but also by any member of the family later born if they allowed the period of limitation to expire, so it is also lost if those persons who were in existence at the time of the alienation lost that cause of action by death *before there came into existence an after-born child* for the after-born child has got no right or action in himself, no individual and separate cause of action that springs up immediately he is born, but his rights to contest, if any, is derived from the right, that those in existence at the date of the alienation who were not consenting had and that right is lost to him when it is lost to them and it is lost to them when they die or when they permit the period of limitation to expire.".

The words italicised emphasised the special feature of that case that there was a clear gap between the death of non-alienating coparcener and the subsequent birth of the objecting coparcener and this therefore made the case

1. (1935) 70 M.L.J. 36: I.L.R. 59 Mad. 667. I.L.R. 47 All. 165 (P.C).
2. (1924) 48 M.L.J. 29: L.R. 52 I.A. 69: 3. (1944) 2 M.L.J. 395 (P.C.).

before the learned Judges *a fortiori* one. But even if these words are deleted the passage will remain as an accurate and terse statement of the law.

Nearly eight months after the decision in *Ransdip Singh* v. *Parameswar Prasad*[1] their Lordships of the Privy Council gave their judgment in *Lal Bahadur* v. *Ambika Prasad*[2]. This decision is a landmark in the evolution of the law on the subject. Its exact scope and significance, have been the subject of considerable discussion among Judges and lawyers in India. In view of its importance the case merits a detailed examination. The facts of the case were as follows: Two Hindu brothers, Ambika and Adit, governed by the Mitakshara sued in 1919 for recovery of family properties alleged to have been improperly sold away by their grandfather Ram Din in 1904. The plaintiff's father Awadu Behari was alive on the date of the suit but his right to challenge the sale had become barred by then. The bulk of the consideration for the sale was applied in discharge of two mortgages created in 1895 over the family properties by Ram Din at a time when the plaintiff's father was an infant aged about 13 years. Of the two plaintiffs it was admitted that Ambika, the elder was a minor in 1904 though his exact age was a point of serious dispute. It was asserted by one party and denied by the other that Adit was born after the completion of the sale of 1904. Of the answers given by the purchaser under the 1904 sale to the attack made against it by the plaintiffs two alone survived before their Lordships Board. (1) The competency of each of the plaintiffs to maintain the suit was denied on the grounds (*a*) that Amibka was more than 21 years of age on the date of the suit and that therefore his remedy in respect of the 1904 sale was barred by lapse of time; (*b*) that Adit was not in existence at all on the date of the sale and had therefore no *locus standi* to question it. (2) On the merits, it was contended that the sale was, in any event, binding on the plaintiffs as having been effected for legal necessity and benefit and for discharge of the antecedent debts of their grandfather. Their Lordships first addressed themselves to the last mentioned contention with this remark: "If this answer of the appellant (alienee) be well founded, the other issue more technical in character and one upon which the Courts in India were actually divided becomes academic". Their Lordships decided this question of substance, *viz*., "whether this (sale) deed was binding as having been for the benefit of the family and for payment of antecedent debts?", in favour of the alienee. They expressly state that in deciding this question of substance, they will "assume without deciding that the suit was maintainable by both respondents." So far the position is plain. But in discussing the binding nature of the sale of 1904 as against the plaintiffs, their Lordships scan with care the various items of consideration recited in the sale deed and as part of that investigation probe into the origins of the transaction in the mortgages of 1895, the discharge of which, as stated already, formed the bulk of the consideration for the impugned sale, and proceed to examine how far, if at all, those transactions of 1895 bound the plaintiffs. The following observations are important:

"The respondents, Plaintiffs in the suit are sons of Awadh Behari (. . . .) In 1895 they were still unborn. This as will later appear, is one of the most impotant facts in the case. It follows from it that these two mortgage deeds have always been binding on the respondents. The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated."[3] This is a clear and emphatic expression of opinion on a point which constituted an important step leading to the conclusion that their Lordships ultimately arrived at that the sale was binding on the plaintiffs. There is no doubt some apparent inconsistency in disclaiming an intention to decide the question on one portion of the case and expressly deciding that very question on the other portion of the case. But it is submitted that it is not permissible to neutralise or weaken the effect of their Lordships' express pronouncement on any such ground of inconsis-

1. (1925) 48 M.L.J. 29: L.R. 52 I.A. 69: I.L.R. 47 All. 165 (P.C.).
2. (1925) L.R. 52 I.A. 493: I.L.R. 47 All. 795 (P.C.).
3. (1925) L.R. 52 I.A. 443, 445: I.L.R. 47 All. 795 at 797 (P.C.).

tency. Further, it is worth stressing in this connection that so far as the 1895 mortgages were concerned both the plaintiffs were undoubtedly after-born coparceners. As regards the 1904 sale, Ambika was clearly not an after-born grandson and it was a matter of much uncertainty—no final finding on this point was given by their Lordships—whether Adit was or was not in existence at the date of the sale in 1904; so that on that part of the case which related to the competency of the plaintiffs to maintain the suit, no question of the rights of any after-born coparcener to impugn the antecedent sale really arose in the straight form in which it did actually arise with reference to the mortgages of 1895.

The learned Editor of the 10th edition of Mayne's Hindu Law comments at some length on this decision. (*See* pages 511 and 512, Para 399). He expresses the opinion that: "It may not be right to regard the observation of their Lordships which seem to confine the right to challenge alienations of family property to the coparceners alive at the date of the alienation and to deny such a right to a coparcener who though born subsequent to the alienation acquires an interest in the coparcenary property before the death of the objecting or non-alienating coparceners" as a decision on the question as the point was not considered. He states that it will be against the whole current of Indian authorities which cannot be deemed to be overruled by implication. Further, "If the observation means that coparceners born in the family subsequent to an alienation before the death of the other coparceners who could challenge it, have no right to the property and consequently no right to challenge the alienation, it would conflict with what was said by the Board in *Ramkishore* v. *Jainarin*[1] as well as with the cardinal principle of Hindu Law." With great respect, however, it is submitted that none of the considerations referred to are sufficient individually or cumulatively to deprive the clear pronouncement of their Lordships in *Lal Bahadur's case*[2] of its force as a binding precedent. In the setting in which their Lordships made the observation commented upon in Mayne's Hindu Law it is difficult to regard it otherwise than as a decision on the question. As to the remark that the observation is against the whole current of Indian authorities, it is by no means clear that the authorities are all one way, and even if some of the previous decisions of the Indian Courts are incompatible with their Lordships' pronouncement one need not shrink from treating those decisions as having been abrogated by implication. The so-called conflict between *Ramkishore Kedarnath* v. *Jainarain*[1] and the much discussed observation in *Lal Bahadur's case*[2] is more apparent than real. It is not also clear what is "the cardinal principle of Hindu Law" with which the above observation in *Lal Bahadur's case*[2] is said to conflict.

In *Rajah Vasi Reddi* v. *Lakshminarasimham*[3] Venkataramana Rao, J. in delivering the judgment of the Bench consisting of himself and Abdur Rahman, J., has expressed his considered dissent from Mayne's comment on *Lal Bahadur's case*[2]. His Lordship demonstrates that the case in *Ramkishore Kedarnath* v. *Jainarain*[1] does not enunciate any principle in conflict with the decision in *Lal Bahadur's case*[2]. But as the learned Judges in that case were prepared to rest their decision on a ground which they thought was a safer one, they closed the discussion with these inconclusive observations. "Much may be said in favour of either view and it may be that the view expressed in Mayne's Book is sounder. The scope and effect of the Privy Council decision in *Lal Bahadur* v. *Ambika Prasad*[2] may require consideration." These observations do not, however, detract from the force and cogency of their earlier remarks criticising Mayne's reading of *Lal Bahadur's case*[2]. In *Gujarat Oil Mills and Manufacturing Company* v. *Shakarbai*[4] a Bench consisting of Beaumont, C.J., and Sen, J. has interpreted *Lal Bahadur's case*[2] as a decisive authority against the after-born coparcener. According to this interpretation, the after-born coparceners have no rights at all in the alienated property except perhaps the limited right of "sharing in relief." (Vide *Ram Kishore Kedarnath* v. *Jainarain*[1])

1. (1913) 25 M.L.J. 512 : L.R. 40 I.A. 213 : I.L.R. 40 Cal. 966 (P.C.).
2. (1925) L.R. 52 I.A. 443 : I.L.R. 47 All. 795 (P.C.).
3. (1940) 1 M.L.J. 820 : I.L.R. (1940) Mad. 913.
4. I.L.R. (1943) Bom. 423.

that the non-alienating coparcener who was in existence at the alienation might ultimately obtain by carrying the attack against the alienation to a successful conclusion during his lifetime. It may be that this is an extreme view, but the result arrived at in that case appears to be inescapable on the strict logic of the principle on which *Lal Bahadur* v. *Ambika Prasad*[1] is based. It is not irrelevant to advert to one other aspect of *Lal Bahadur's case*[1]. There was nothing in that case to show that in 1904 the plaintiff's father had given his assent at any time to the mortgages of 1895; nor was there anything to show that in 1904 his rights to attack the said alienations of 1895 were barred by time. It is not apparent whether the significance of these two negative features of the situation in 1904 was fully appreciated by their Lordships when they held that the mortgages of 1895 "have always been binding on the respondents." The learned Editor of the 11th Edition of Mayne has not made any alterations in the text of the passage in the 10th Edition which contains the comments on *Lal Bahadur's case*[1] considered above. But, he has added a sentence to the text: "The question must be taken to be now concluded by the recent decision of the Privy Council in *Akhara Udasi Nirwani* v. *Surajpal Singh*[2] (Page 502, para. 399—Mayne's Hindu Law, 11th Edition ").

An endeavour has been made in the foregoing analysis to demonstrate that the *Akhara Udasi Nirwani* v. *Surajpal Singh*[2] cannot be treated as a considered pronouncement on the question having regard to the cautiously worded reservation about the corrections of the propositions of law "assumed" by their Lordships without discussion to be accurate and adequate for deciding the case before them. The remarks "that the whole current of" not merely "the Indian authorities" but their Lordships own previous decisions on the subject "which were neither referred to, nor considered and cannot therefore be deemed to be overruled" apply with equal if not greater force to the instant decision[2], the "ratio" of which is contained in two sentences based on a concession made by Counsel assumed by their Lordships to be correct without any independent examination in the light of principles or precedents.

(4) and (5) Testing the actual result arrived at in *Akhara Udasi Nirwani* v. *Surajpal Singh*[2] in the light of the principles established by or deducible from the previous authorities it is submitted that the conclusion that the fourth defendant is entitled to contest the validity of the suit mortgage at a time when his elder brother who was alive on the date of the mortgage was dead is unsupportable. Such a conclusion, can, if at all, be supported only on the theory that a later-born coparcener like the fourth defendant has an individual and separate cause of action that springs immediately he is born, a theory that is inconsistent with *Ransdip Singh* v. *Parameshwar Prasad*[3] and which has been discarded as unsound on very cogent reasoning in *Visweswara Rao* v. *Surya Rao*[4] That even their Lordships were not prepared to base their decision on any such simple theory is clear from their invoking the principle of "overlapping of lives" which it would have been unnecessary to call into aid if the former theory could have furnished a sure basis for the decision. Further the limits of the exception created by the "overlapping of lives" have not been considered by their Lordships in all its bearings. The weakness of the decision on this point lies in not adverting to the implications arising out of the death of the eldest son without affirming or repudiating the mortgage. But even if the correctness of the conclusion that the fourth defendant is entitled to raise a contest about the validity of the mortgage is not open to question, there is certainly no justification either in logic or in the reason of the rule for extending that privilege to his younger brother the sixth defendant, who was born long after the death of the eldest son. To arrive at that result, the exception engrafted on the general rule should be read as wide enough to embrace within its ambit the overlapping of a portion of the life of a coparcener born after the alienation and

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1. (1925) 52 I.A. 443 : I.L.R. 47 All. 795 (P.C.).
2. (1944) 2 M.L.J. 395 (P.C.).
3. (1924) 48 M.L.J. 29 : L.R. 52 I.A. 69 : I.L.R. 47 All. 165 (P.C.).
4. (1936) 70 M.L.J. 360 : I.L.R. 59 Mad. 667.

after the death of the only coparcener (besides the alienor) existing at the alienation, over a portion of the life of another coparcener also born after the alienation, but before the death of the non-alienating one who was alive at the time of the alienation. This, it is submitted, is not sound logic and it is doubtful whether it is good law. Their Lordships have not differentiated at all between defendants 4 and 6 as regards their rights to resist the mortgage. The point of our emphasis is that there is an important difference between them in their respective situations in the application of the exception to the general rule even as formulated by their Lordships. No portion of the life of the sixth defendant falls within any portion of the life of the eldest son and there was a clear gap between the death of the eldest son and the birth of the sixth defendant. The exception at any rate as enunciated by their Lordships will have no application to a coparcener in the position of the sixth defendant. It is respectfully submitted that in view of the not very satisfactory manner in which the question has been dealt with the decision in *Akhara Udasi Nirwani* v. *Surajpal Singh*[1] may not be taken as the final word on this subject, especially as it is in plain conflict with their Lordships' earlier pronouncement in *Lal Bahadur's case*[2]. We would conclude by expressing the hope that the Supreme Court of India on which the mantle of the Judicial Committee of the Privy Council has fallen, will consider itself free to re-examine the whole question and to declare the law authoritatively untrammelled by this precedent, when the appropriate occasion arises.

BOOK REVIEWS.

HINDU LAW IN BHARAT by M. N. SRINIVASAN, Advocate, High Court of Mysore, Third Edition, 1951. Published by Anandaram and Company, 439, IX Main Road, Malleswaram, Bangalore, 3. Pages 606. Price Rs. 20.

It is refreshing to go through the book under review as it is a treatise on Hindu Law in the proper sense of the word and not a mere jumbled up collection of case law, which unfortunately is what one finds in many books of law at the present day. The author has in his simple and straightforward language given the propositions of law as deducible from the cases decided. Nor has he shirked his duty as an author to give his own comments on points decided by the cases when he does not agree with them. The various headings under which each topic is discussed is not only exhaustive but is based upon a clear analysis of the whole subject. The time and thought bestowed on the subject by the author can perhaps best be realised only by reading through the book. The value of the book has been really very much enhanced by the well arranged and full index.

THE LAW OF ACCOMPLICES AND APPROVERS by Y. H. RAO, Assisted by Y. R. RAO, Advocates, 1951. Published by Criminal Law Publications, Gudur. Pages 248, Price Rs. 12.

We had, on a former occasion, an opportunity to review an earlier volume in the present series by the same authors and welcomed the attempt that was made to analyse the subject into its separate and component divisions and discuss the law with clarity and exhaustiveness. The present book, the second of the series continuing the same method of treatment and arrangement of the matter has, it must be said, elucidated the law clearly in regard to Approvers and Accomplices in the light of the numerous decisions on the subject. After a discussion of the case law, the propositions established by the cases are enumerated and the law on the subject is given. We look forward with interest to the other books of the series.

1. (1944) 2 M.L.J. 395 (P.C.).
2. (1925) L.R. 52 I.A. 443 : I.L.R. 47 All. 795 (P.C.).

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The steady increase in the number of decisions rendered by the Supreme Court and High Court makes it very necessary to have a resume of the case-law at least once a year so that one can take note of the current trends of the law. The attempt to give the history of the case-law for a year has in its very nature certain limitations. While it has to be merely a factual summary of the decisions, there is not much scope for making comments on the decisions themselves. Even with these limitations, a mere survey of the case-law of the past year under familiar topical headings has been recognised to have its own advantages and the requests for such a survey more than justifies the usual feature, though a little belated this year.

High Court—Its Powers and Jurisdiction.

As regards the powers of the High Court to issue writs specified in Article 226 of the Constitution it was held by the Full Bench in *Srinivasa Bhat* v. *The State of Madras*[1], that the High Court has both the power and jurisdiction to issue the writs specified in Article 226 of the Constitution not only within the limits of its original jurisdiction but throughout the territories of the State. An argument to the contrary based upon the decision of the Privy Council in *Ryots of Garbando* v. *Zamindar of Parlakimidi*[2], was negatived by the Full Bench. The Supreme Court had occasion to point out in *The State of Orissa* v. *Madan Gopal Rungta*[3], the exact scope of the High Court's powers under Article 226 of the Constitution. It was held that directions in the nature of *interim* relief as the *only* and final relief cannot be granted under Article 226 when a Court expressly states that it refrains from determining the rights of parties on which a writ of *mandamus* or directions of a like nature could be issued because the existence of a right in the aggrieved party is the foundation of the exercise of jurisdiction of the Court under that Article. When a Court declines to decide the rights of parties it could not merely for the purpose of facilitating the institution of a civil suit by the aggrieved party issue directions in the nature of temporary injunction only to circumvent the provisions of section 80 of the Civil Procedure Code. As remarked by the Supreme Court, the language of Article 226 does not permit such an action . such a direction would not be within the scope of that Article. That the High Court cannot embark on an enquiry into the merits in *certiorari* proceedings was a point decided in *Panchayat Board, Kankipadu* v. *Inspector of Local Boards*[4]. According to the ruling in *Dr. M. Krishnamurthy* v. *The State of Madras*[5], neither the Government nor the Disciplinary Proceedings

1. (1951) 1 M.L.J. 115 (F.B.).
2. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. (1944) Mad. 457 (P.C.).
3. 1951 S.C.J. 764 : (1951) 2 M.L.J. 645 (S.C.).
4. (1951) 1 M.L.J. 285.
5. (1951) 1 M.L.J. 709.

Tribunal enquiring into the conduct of a civil servant would fall within Article 227 of the Constitution and come under the superintendence of the High Court, so as to empower the latter to interfere with its orders. The conditions necessary for enabling the High Court to withdraw a case filed in a Subordinate Court to itself under the provisions of Article 228 of the Constitution were stated in *Ramaswami Ambalam* v. *Madras Hindu Religious Endowments Board*[1], and it was held that where a question regarding the validity of section 57 of the Madras Hindu Religious Endowments Act arises, it was fit case for withdrawal provided the other conditions were satisfied.

Constitutional Law.

The much debated question as to the constitutional validity of delegated legislation came in for a very exhaustive discussion by the Supreme Court in the *Reference under Article* 143 *of the Constitution.*[2] The doubts on the subject created by the decision in *Jatindra Nath Gupta* v. *Province of Bihar*[3], to some extent made the reference necessary. Though the decision is with reference to the provisions of particular laws, namely, the Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947, and Part C States (Laws) Act, 1950, they were chosen as the object of reference as being typical of a certain kind of legislation which is attacked as amounting to delegation of legislative power which is illegal. The actual decision by the majority was that the impugned provisions were quite valid and in coming to that conclusion there was an elaborate discussion on the question of the delegation of legislative power and statements by all the Judges as to what would amount to delegated legislation and what would not. Though a reading of the different judgments might enable one to know the whole law on the subject, the difficulty comes in only in the application of the principles laid down to particular kinds of legislation. The same cases are relied upon for different positions and ultimately it is a matter for decision in each case. No doubt the principles to be applied have been very well clarified in the case. On a question, as to when a law becomes operative, the Supreme Court held in *Harla* v. *The State of Rajasthan*[4], that natural justice required that before a law can become operative it must be promulgated or published *i.e.*, it must be broadcast in some reasonable way so that all men may know what it is and when a law is not so promulgated it would not be a law validly made. A company incorporated under the Indian Companies Act, was held in *Narasaraopeta Electric Corporation, Ltd.* v. *The State of Madras*[5], not to satisfy the requirements of the definition of a "citizen" in Article 5 of the Constitution and that as such the company cannot invoke Article 19 of the Constitution. To the same effect are also observations in *Sree Meenakshi Mills, Ltd.* v. *State of Madras*[6]. In laying down the scope of Article 13 (1) of the Constitution, the Supreme Court in *Keshavan Madhava Menon* v. *The State of Bombay*[7], has said that Article 13 (1) has no retrospective effect but is wholly prospective in its operation and further that it does not in terms make the existing laws which are inconsistent with the fundamental rights void *ab initio* or for all purposes. Its effect was stated to be only to nullify or render all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with reference to the exercise of fundamental rights on and after the date of the commencement of the Constitution. The result of so holding was that proceedings commenced under an Act (in this case Press Emergency Powers Act), before the commencement of the Constitution would not be affected by the Constitution coming into force even though the provisions of the Act may become void with respect to the exercise of any of the fundamental rights after the Constitution came into force.

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1. (1951) 2 M.L.J. 511.
2. 1951 S.C.J. 527.
3. (1949) 2 M.L.J. 356 : 1949 F.L.J. 225.
4. 1951 S.C.J. 735.
5. (1951) 2 M.L.J. 277.
6. (1951) 2 M.L.J. 383.
7. (1951) 1 M.L.J. 370 : 1951 S.C.J. 182.

The nature of the right to equal protection of laws guaranteed to every citizen by Article 14 of the Constitution was the subject-matter of a number of decisions both by the Supreme Court and the High Court. In *Charanjit Lal* v. *The Union of India*[1], though it was held by the majority that the particular legislation in question, namely, the Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950, was not shown to have transgressed the scope of constitutional inhibition contained in Article 14, the Judges of the Supreme Court have given their opinion as to when a legislation can be said to be discriminatory and the scope of the presumption in favour of the constitutional validity of a law made by a competent Legislature. The difference in rates of income-tax arising by reason of pending proceedings being continued according to the law of the Integrating States prior to the integration into the State of Pepsu was held in *Ramji Lal* v. *Income-tax Officer, Mohindar Garh*[2], not to be discrimination brought about by the Pepsu General Provisions (Administration) Ordinance, 2006, but by the fact that there was a levy of income-tax in some States prior to integration and no such levy in other States. Moreover, it was pointed out, the provision in the Ordinance that pending proceedings should be concluded according to the law applicable at the time when the rights or liabilities accrued and the proceedings commenced was a reasonable law founded upon a reasonable classification of the assessees which is permissible under the equal protection clause to which no exception could be taken. In *The State of Bombay* v. *Balsara*[3], it was held by the Supreme Court that section 39 of the Bombay Prohibition Act, 1949, could not be attacked on the ground that its provisions violate Article 14 of the Constitution in that the concession shown to warships, troop-ships and military and naval messes and canteens violates the principle of equality before the law. It was pointed out that there was nothing wrong *prima facie* in the Legislature according special treatment to persons who form a class by themselves in many respects, *i.e.*, military and naval forces and who have been treated as such in various enactments and statutory provisions. In *V. G. Rao* v. *The State of Madras*[4], it was held by the majority that the Criminal Law Amendment Act, as amended by Criminal Law Amendment (Madras) Act, XI of 1950 did not contravene Article 14 of the Constitution as the Act itself did not discriminate between persons. Though the procedure laid down in the Amending Act was different from the procedure which obtains in the case of other offences, it was held that it amounted to classification and that such a classification cannot be said to be discriminatory. There is an elaborate statement of the law as to what the phrase equality before the law used in Article 14 means in *Krishnamachary* v. *Venkateswaran*[5], in which it was held that the provisions of the Madras Agriculturists Relief Act does not offend against the principle of equal protection before the law. That the discrimination that may appear apparent in the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, in that it makes a discrimination between Hindus in the matter of marrying more than one wife was not based upon religion *only* and so would not offend Article 15 of the Constitution was the opinion expressed in *Srinivasa Iyer* v. *Saraswati Ammal*[6]. The fundamental right guaranteed under clauses (2) and (3) of Article 16 was held to be infringed by the Madras Communal G.O. regulating the recruitment to the office of District Munsiff by the Supreme Court in *Venkataramana* v. *State of Madras*[7], because the ineligibility created in regard to a Brahmin was based only on the ground of his being Brahmin and is not sanctioned by clause (4) of Article 16. In *State of Bombay* v. *Balsara*[3], the Supreme Court pointed out that the prohibition against "commending" any intoxicant is a curtailment of the right to freedom of speech and expression guaranteed under Article 19 (1) (*a*) and would not be saved by clause (2) of Article 19 and on that ground declared the provisions of section 23 (*a*) and 24 (1) (*a*) of the Bombay Prohibition Act as *ultra vires* the State Legislature. In holding that section 4 (1) (*d*) of

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1. (1951) S.C.J. 29.
2. (1951) 1 M.L.J. 384 : 1951 S.C.J. 203.
3. (1951) 2 M.L.J. 141 : 1951 S.C.J. 478.
4. (1951) 1 M.L.J. 628 (F.B.).
5. (1951) 2 M.L.J. 366.
6. (1951) 2 M.L.J. 649.
7. (1951) 1 M.L.J. 625 : 1951 S.C.J. 318.

the Press (Emergency Powers) Act, 1931, *ultra vires* the fundamental rights guaranteed under Article 19 (1) (*a*) in *Srinivasa Bhat* v. *State of Madras*[1], the Full Bench of the Madras High Court followed the decisions of the Supreme Court in *Ramesh Thappar* v. *The State of Madras*[2] and *Brij Bhushan* v. *State of Delhi*[3], and further stated that freedom of speech and expression would include the liberty to propagate not only one's own views but also the right to print matters which are not one's own but have either been borrowed from someone else or printed under the directions of that person. The impugned legislation was held not capable of being saved by the reservations relating to permissive legislation contemplated by Article 19 (2) of the Constitution. In *Vengan, In re*[4], in holding that picketing and dissuading customers from purchasing in North Indian's shop would not be within the fundamental rights of freedom of speech and expression the Court rightly pointed out that the Courts will be slow to recognise and uphold an extension of a fundamental right which infringes and violates another fundamental right, namely, to carry on one's own trade or business. That section 61 (3) of the Income-tax is in the nature of a reasonable restriction on the exercise of the right under Article 19 (1) (*g*) in the interests of the general public and so valid was the point decided in *Chandrasekhara Reddi* v. *Commissioner of Income-tax*[5]. While a notification under clause 18 of the Cotton Control Order, 1950, prohibiting export of cotton outside an area without permission of the Government was held would fall under Article 19 (5), the Notification under clause 6 of the Cotton Control Order, 1950, prohibiting sale or purchase of cotton unless it is sold to specified "nominees" would not be a reasonable restriction on the fundamental rights mentioned in Article 19 (1) (*g*)—*Kandaswami Reddiar* v. *Textile Commissioner, Government of India*[6]. In *Krishnan* v. *The State of Madras*[7], Article 22 (4) was held not to be affected by the Preventive Detention (Amendment) Act, 1951, sections 9 and 11. The scope and effect of Article 22 (5) and (6) of the Constitution was the subject-matter of consideration by the Supreme Court in *State of Bombay* v. *A. R. S. Vaidya*[8], and *Tarapa De* v. *State of West-Bengal*[9], and the scope and extent of the rights of a person detained in preventive detention to be supplied the grounds of his detention came in for an elaborate examination. The rights of detained person to be furnished with "the grounds on which the order has been made" and to be afforded "the earliest possible opportunity of making a representation against the order" were pointed to be though separate and distinct were still connected with each other. But the test to be applied in respect of the contents of the grounds for the two parts are quite different and when there is an infringement of the two rights the detenu is entitled to approach the Court and even if the infringement of the second part of the right is established he is bound to be released by the Court. The further point decided in the first of the two cases mentioned above was that there might be communication of supplemental grounds provided they do not make a new ground. The judgment under notice finally concludes by saying that from the fact that Article 22 (6) give a right to the authorities to withhold facts which they consider not desirable to be disclosed in the public interest, it does not follow that what is not stated or considered to be withheld on that ground must be disclosed and if not disclosed there is a breach of fundamental right. These principles have been followed and emphasised in the second of the cases. The scope of the right under Article 29 (2) of the Constitution, came in for an authoritative pronouncement by the Supreme Court in *The State of Madras* v. *Champakam Dorairajan*[10], and it was decided that the right to get admission into any educational institution of the kind mentioned in Article 29 (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens and that this right is not to be denied to the citizen on grounds only of religion, race, caste,

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1. (1951) 1 M.L.J. 115 (F.B.).
2. (1950) 2 M.L.J. 390 : 1950 S.C.J. 418.
3. (1950) S.C.J. 425.
4. (1951) 2 M.L.J. 241.
5. (1951) M.L.J. 565.
6. (1951) 2 M.L.J. 658.
7. (1951) 2 M.L.J. 105 : 1951 S.C.J. 453.
8. (1951) 1 M.L.J. 389 : (1951) S.C.J. 208.
9. (1951) 1 M.L.J. 431 : (1951) S.C.J. 233.
10. (1951) 1 M.L.J. 621 : 1951 S.C.J. 313.

language or any of them. The Judges conclude by saying that if in spite of his having the necessary academic qualifications a citizen is refused admission only on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right. The result was that the classification in Madras Communal G.O., regulating admission to colleges was held to proceed on the basis of religion, race and caste and was opposed to the Constitution and constituted a clear violation of the fundamental right guaranteed to the citizen under Article 29 (2) and is therefore void under Article 13. It may be incidentally mentioned that this confirmed the decision of the High Court in *Champakam Dorairajan* v. *The State of Madras*[1] and the argument that Article 46 can be relied on to save the G.O., was negatived with the remark that it cannot override the provisions of Article 29 (2) as the directive principles of State Policy cannot override the provisions found in Part III of the Constitution and they have to conform to and run as subsidiary to the chapter on fundamental rights. Collection of taxes would not amount to deprivation of property within the meaning of Article 31 (1) of the Constitution was the decision in *Ramjilal* v. *Income-tax Officer, Mohindar Garh*[2], and further that clause (1) of Article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition of collection of taxes. The protection against imposition and collection of taxes by authority of law would according to the decision come under Article 265 and not Article 31 (1). Articles 31-A and 31-B introduced by the Constitution (First Amendment) Act, 1951, do not according to *Shankar Prasad* v. *Union of India*[3], either in terms or effect seek to make any change in Article 226 or in Articles 132 and 136 and that the powers of the High Court or the Supreme Court are not in any way affected by the new Articles. The question as to the meaning of the expression 'final order' in Article 133 was fully discussed in *Ramaswamy Chettiar* v. *O. R., Ramanathapuram*[4] and it was held that the expression has to be given the same meaning in civil and criminal cases, that is, it must be an order which finally determines the points in dispute and brings the case to an end. The test laid down was, that the finality must be in relation to the suit, the fact that the order decides an important and even a vital issue by itself not being material, unless the decision puts an end to the suit. Applying the principles it was held that a decision of the High Court reversing a decision of a subordinate Court holding that an execution petition is not barred and remanding the execution petition for further hearing was not a final order within the meaning of Article 133. It was further pointed out that it cannot be said that leave could be granted under sub-clause (*c*) of Article 133 (1) even if the order is not a final one. A Full Bench has tried to give an authoritative decision on the meaning of the words "substantial question of law" in *Subba Rao* v. *Veeraju*[5]. While deciding that it cannot be said that any question of law, a decision on which may affect materially the rights of the parties is a substantial question of law, it was pointed out that it was neither possible nor useful to attempt to exactly define terms like "substantial", "reasonable" and "just and equitable" and that it ultimately resolves itself into their meaning that the Court considers to be substantial, reasonable or just and equitable. Where a Court thinks it necessary to deal with a question of law at some length and discuss alternative views which can be taken on the point, such a question was held would be a substantial question of law. A point of law practically covered by the decision of the Privy Council or Supreme Court, would not be a substantial question. Even if a question of law is not important or difficult, if there is room for reasonable doubt or difference of opinion on the question then it would be substantial question of law. The conditions under which leave to appeal to the Supreme Court would be granted under Article 134 (1) (*c*) were stated in *Narayan* v. *Kesappa*[6], to be practically the same as the conditions which ought to exist for the Supreme Court to grant special leave to appeal. Such leave can be granted only in those cases where special circumstances are shown to exist and unless it is shown that exceptional circumstances exist and that severe

1. (1950) 2 M.L.J. 404 (F.B.).
2. (1951) S.C.J. 203 : (1951) 1 M.L.J. 384.
3. (1951) 2 M.L.J. 683 : 1951 S.C.J. 775.
4. (1951) 2 M.L.J. 479.
5. (1951) 2 M.L.J. 222 (F.B.).
6. (1951) 1 M.L.J. 296.

and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against, leave to appeal cannot be granted. In *Sheriff* v. *Govindan*[1], it was pointed out that merely because of the restricted and limited right of appeal to the Supreme Court under Article 134 (1), it could not be said that the Supreme Court is a Court of Criminal appeal against the decisions of the High Court in Criminal matters. The actual decision was that when the High Court orders the prosecution of certain police officers under section 193, Penal Code, there is no automatic right of appeal to the Supreme Court under section 476-B of the Criminal Procedure Code against such an order. The Judges conclude by saying that the right of appeal in criminal matters to the Supreme Court is exclusively governed by Article 134 of the Constitution. In *Janardhan Reddy* v. *The State*[2], it was held that under Article 136 the Courts which passed the judgments or sentences must be Courts within the territory of India and so judgments and sentences passed by the Hyderabad High Court before the 26th of January, 1950, cannot be the subject-matter of a special appeal to the Supreme Court. As to when directions in the nature of *mandamus* would be issued it was held in *Sekkilar* v. *Krishnamoorthy*[3], that though the provisions of Article 226 were apparently wide, directions in the nature of *mandamus* should not issue except to a public officer or quasi-public officer who is under an obligation, statutory or otherwise, to do or refrain from doing anything which is likely to interfere with the rights of persons. Though the Principal of college, maintained out of funds of public trust may be a quasi-public officer, it was held, that the High Court will not interfere with his discretion in the matter of maintenance of discipline of the college (In this case an order directing a student, to leave the college). In *Kallumattam Thippaswami, In re*[4], a warning was given that Article 226 of the Constitution should not be construed so as to replace the ordinary remedies by way of a suit and application available to the litigant under the general law of the land, and the fact that the Court in which such a remedy could be asked is closed for the vacation would not render the Article applicable. The scope of the powers of High Court has been considered in dealing with the High Court and its powers and would be redundant here. The scope and applicability of Articles 368, 379, and 392 came up for consideration before the Supreme Court when the question of the validity of the Constitution (First Amendment) Act, 1951, was raised in *Shankar Prasad* v. *Union of India*[5], and it was pointed out that it was not correct to say that Article 368 is a complete code in respect of the procedure provided by it and that Article 379 must be viewed and interpreted in the wider perspective of the entire scheme of the constitutional provisions in regard to Parliament and not in an isolated relation to Article 368 alone. According to the decision, the terms of Article 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatever and that Article 13 (2) does not affect amendments under Article 368. It was finally held that the new Articles being essentially amendments of the Constitution, Parliament alone had the power of enacting them and that it did not matter that the laws thus saved relate to matters covered by List II. As a result of the all-embracing words in Article 363 (1), it was held in *State of Seraikella* v. *Union of India*[6], that it clearly overrides Article 374 (2) also and that the result is that Article 363 (1) is the controlling Article over Article 374 (2) also. According to the decision under notice, Article 374 (2) cannot be read as giving the Supreme Court an extended jurisdiction in regard to cases removed to it from the Federal Court and that as such the Supreme Court would not have jurisdiction to decide suits filed in the Federal Court relating to disputes regarding instruments of accession executed by certain States before the commencement of the Constitution. An interesting point as to whether the decisions of the Federal Court on points of law are binding on the High Courts after the Constitution came into force was answered in *Arumugham* v. *The State of Madras*[7], in the affirmative on an interpretation of Article 374 (2) of the Constitution.

1. (1951) 2 M.L.J. 501.
2. (1951) S.C.J. 98.
3. (1951) 2 M.L.J. 568.
4. (1951) 2 M.L.J. 171.
5. (1951) 2 M.L.J. 683 : (1951) S.C.J. 775.
6. (1951) S.C.J. 425.
7. (1951) 1 M.L.J. 169.

Criminal law.

The crucial point of time for deciding whether the benefit of section 84, Penal Code, should be given or not was stated to be, the material time when the offence takes place, according to the decision in *Govindaswamy Padayachi, In re*[1], which also laid down the conditions when section 84 should be applied. Abnormality either before or after the commission of the crime would not be relevant. The fundamental principles to be observed by Courts in convicting persons accused in a rioting case against a large number of persons were stated very elaborately in *Arulanandu, In re*[2]. In *Ponniah, In re*[3], it was held that a commissioner appointed by a Court to divide the properties by metes and bounds in a partition suit would be a public servant within the meaning of section 21 of the Penal Code and as such an obstruction to his proceedings would be an offence under section 186 of the Penal Code. In considering the question of the application of sections 34 and 302 it was observed in *Ramaswami, In re*[4], that a common intention to use loaded revolvers for the purpose of killing, if necessary, has to be presumed against bandits and robbers who are armed with these weapons and if a man is killed the robbers so armed and acting in concert are all clearly guilty of murder under section 302 read with section 34 of the Penal Code though each may not have actually fired a shot. In the case of murder of some and attempt to murder others the extreme penalty was held not necessary where some kind of hallucination or frenzy might have been working on the mind of the accused at the time of murder in *Palaniswami Goundan, In re*[5]. According to the decision in *Palani Mooppan, In re*[6], where a fatal injury is inflicted by the accused on a vital portion of the deceased's body with a deadly weapon in the course of a sudden and unexpected quarrel, a conviction under section 304 (2) of the Penal Code would be justified. In *Intoor John* v. *State*[7], it was held that a very high degree of negligence is required to be proved before a charge under section 304 of the Code is established and in that case the driving of a double-bullock-cart was so rash and negligent that a conviction under section 304-A was upheld. An offence under section 341 could not be said to be committed by mere words without any physical obstruction as observed in *Attappa Goundan, In re*[8]. There is an interesting discussion in *Boya Chinnappa*[9], as to whether in regard to an offence under section 375, Penal Code, corroboration of the evidence of the prosecutrix is necessary. The ingredients of the offence of cheating under section 420 was stated to be, deception of any person and fraudulently or dishonestly inducing that person to part with property in *Public Prosecutor* v. *Vedantam*[10]. According to the decision in *Doraiswami Reddiar, In re*[11], section 477-A of the Penal Code only requires the falsification of accounts with intent to defraud and that it does not require any deprivation of property. In *Marthamma, In re*[12], it was decided that when a Hindu becomes a Christian and married a Christian lady and on reconversion to Hinduism marries a Hindu lady he will not be guilty of an offence under section 491 of the Penal Code. That statements in affidavit in support of application for transfer being allegations made for the protection of the interest of the party making it would be governed by exception 9 to section 499, if made in good faith, was the point decided in *Aravamudha Aiyangar* v. *Santhana Krishnan*[13].

Evidence.

That a confession made by an accused to a police officer though it cannot be used against the accused it may be used in favour of the accused was the point of decision in *Mottai Thevar*, In re[14]. In that case the only extenuating circumstances were found in the confession made by the accused to the police which was

1. (1951) 2 M.L.J. 356.
2. (1951) 2 M.L.J. 446.
3. (1951) 2 M.L.J. 191.
4. (1951) 2 M.L.J. 630.
5. (1951) 1 M.L.J. 291.
6. (1951) 1 M.L.J. 679.
7. (1951) 2 M.L.J. 54.
8. (1951) 1 M.L.J. 13.
9. (1951) 1 M.L.J. 110.
10. (1951) 1 M.L.J. 554.
11. (1951) 1 M.L.J. 691.
12. (1951) 1 M.L.J. 694.
13. (1951) 2 M.L.J. 229.
14. (1951) 2 M.L.J. 605.

also the first information report and it was held that the Court was entitled to use the confession in favour of the accused, though it was made to the police. Justice Mack, one of the Judges, had some remarks to make regarding the operation of sections 25 to 27 of the Evidence Act while the other judge, Justice Somasundaram expressed his inability to share the views of his learned brother. As regards the admissibility of deposition given in the preliminary inquiry it was held in *Bora Narasimhalu*, In re[1], that what is contemplated by section 33 of the Evidence Act was only an opportunity to cross-examine the witness and not an effective exercise of it and that all that a Court would have to do is in such cases to exercise caution before admitting such a statement. It was pointed out that it could not be postulated that in every case where the accused is not represented by counsel and could not submit the witness to a searching cross-examination he had no opportunity to cross-examine and therefore that the evidence of the witness should not be admitted under section 33 of the Evidence Act. The mode of proof of an order passed by the Government has to be by the order itself being filed because no secondary evidence of the order would be permissible without the conditions of section 65 of the Evidence Act being complied with—*Ragaviah* v. *The State*[2]. As to when the presumption under section 106 of the Evidence Act arises it was held in *Vella Pillai*, In re[3], that where goods have been entrusted to a carrier for being booked and he fails to book them and they are lost, the carrier is in especial knowledge and is bound to explain their missing under section 106 of the Evidence Act and when he fails to explain, the presumption under section 106 of the Act can be applied against him. A person who has special knowledge of a thing namely, certain articles supplied under a permit for a purpose, cannot when he does not apply the materials for that purpose escape liability for the contravention of the conditions of the permit from the mere fact that the prosecution is not able to prove where the articles in question were and how they were disposed of according to the decision in *Public Prosecutor* v. *Ramaswami*[4]. It was further emphasised that Courts should never fail to apply section 106 of the Evidence Act to cases of special knowledge and burden in similar cases. As to when section 124 of the Evidence Act could be applied it was pointed out in *Appa Rao* v. *Surya Prakasa Rao*[5], that it could be applied only when the communication is made to a public officer in official confidence and that statements made by witnesses in a departmental enquiry regarding the conduct of a police officer cannot be held to be made in official confidence with the result that in a subsequent prosecution those statements could be used by the accused and no privilege can be claimed in respect of them. The practice of Judges and Magistrates questioning the witnesses as if they were cross-examining counsel was strongly deprecated in *Sivasubba Nadar*, In re[6], as being not only opposed to section 138 of the Evidence Act, but also as being unfair to the accused. It was further held that the Judge's power to put questions under section 165 of the Evidence Act was not intended to be used in such a manner.

Torts.

In the case of an action for damages by a passenger in a taxi injured in a collision against the owner of the taxi it was pointed out in *Mrs. Halligua* v. *Mohansundaram*[7], that the theory that damages at law could not be proved in respect of personal injuries unless there was some injury which may be called "bodily" or 'physical', but which

1. (1951) 2 M.L.J. 478.
2. (1951) 2 M.L.J. 52.
3. (1951) 2 M.L.J. 53.
4. (1951) 2 M.L.J. 199.
5. (1951) 1 M.L.J. 526.
6. (1951) 1 M.L.J. 207.
7. (1951) 2 M.L.J. 471.

necessarily excluded an injury which was only mental was wrong at the present day. The fact that a policy of Motor Insurance restricted the liability only to "personal injuries" will not help the insurance company according to this decision to escape liability for damages in cases of nervous shock as a result of the accident because if by reason of an acute shock to the nervous system the activities of the body are impaired and incapacitated from functioning normally, there is clear "bodily injury". No doubt a qualification was added that it is only shock of such description which can be measured by direct consequences on the bodily activity which can form the basis for an action in damages and that it is not possible to lay down any hard and fast rule and each case has to be dealt with on its own merits.

Hindu Law.

The categories of rights in a joint Hindu family consisting of a father and sons were said to be three in *Pulleswara Rao* v. *Suramma*[1], namely, the share of the father, the share of the sons and the capacity of the father to sell the share of the sons under certain circumstances. According to that decision when the father is adjudicated an insolvent it is only the first and third rights that vest in the Official Receiver and that when a creditor is proceeding against the second right, the sons cannot compel the creditor to implead the Official Receiver so long as the second right has not been disposed of by the Official Receiver in exercise of the second right. As regards the effect of division by metes and bounds in respect of some items upon other items unpartitioned at the division it was held in *Kannan* v. *Anbu Kurup*[2], that no distinction could be drawn between a joint Hindu Family under the Mitakshara Law and a Malabar Tarwad. After an elaborate examination of the relevant texts and case-law on the matter it was held in *Govindarajulu* v. *Balu Ammal*[3], that the principle of representation recognised under Hindu Law of the son, grandson and great grandson taking the self-acquired properties of the father together could not be extended to the case of an illegitimate son of a legitimate son and that accordingly the illegitimate son of a predeceased legitimate son of the propositus was not entitled to inherit in the right of his putative father on the principle of representation. In *Sooranna* v. *Venkataratnam*[4], it was held that no person can claim an estate as heir of a still-born child because the child in embryo should be born alive in order to be invested with a right. It was pointed out that the course of inheritance cannot be diverted by the mere foetal existence of a child not born alive. In discussing the question as to the preference if any, between a married daughter with children and married daughter without children in regard to Stridhana succession, the texts and authorities were reviewed in *Rajamma* v. *Padmavatamma*[5] and it was held that there is no rule of Hindu Law governing the succession of daughters to the stridhana of their mother under which a childless married daughter is entitled to preference over a married daughter with children when both are equally poor. It was pointed out that there are only two rules of preference, namely, the rule which prefers unmarried daughters to married daughters and the rule which prefers unprovided daughters to provided daughters and that there was no third rule which lays down a preference among equally provided or unprovided daughters, namely that among them the issueless should be preferred to those with issue. *Yegnanarayana Sastri* v. *Lakshminarayana*[6], the law in regard to compromise of a litigation by a widow and its binding nature was considered and it was laid down that while a Hindu widow or other limited owner has power to compromise claims against the estate repre-

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1. (1951) 1 M.L.J. 168.
2. (1951) 1 M.L.J. 493.
3. (1951) 2 M.L.J. 209.
4. (1951) 2 M.L.J. 664.
5. (1951) 2 M.L.J. 487.
6. (1951) 1 M.L.J. 502.

sented by her, to be binding on the reversioners, it must be *bona fide*, fair and reasonable or for the benefit of the estate and not for the personal advantage of the limited owner at the expense of the estate. In such a fair compromise the alienation involved in the compromise would also bind the reversioners because the alienation cannot be considered apart from the compromise. If the arrangement or settlement is not *bona fide*, any property which the claimant takes from the widow under such an arrangement will be held by him only as an alienee from a limited owner and with no higher rights. The right of reversioner in whose favour the widow has surrendered the estate to recover possession of property which the limited owner had permitted a stranger to be in possession was examined in *Bala Tirupura Sundara Rao* v. *Kotayya*[1] and it was observed that as a surrenderee is not allowed to displace the title of the alienee holding the property under an alienation by a limited owner which was not for a necessary binding purpose, on the same analogy a person who had acquired title by adverse possession must be protected, the right of the reversioner to sue to recover possession being postponed to the death of the limited owner. But in cases where possession was permissive, it will be open to the surrenderee to recover the property. According to the decision in *Krishnamraju* v. *Reddamma*[2], in the absence of evidence that lands set apart for the maintenance of a female member of a Hindu family were not to be resumed on her death, the presumption is that they are resumable. The Supreme Court in *Angurbala Mullick* v. *Debabrata Mullick*[3], had to consider the applicability of the Hindu Women's Rights to Property Act to the case of a devolution of shebaitship. It was pointed that there was nothing in any of the provisions of that Act from which an inference could be drawn that the expression "property" as used in section 3 (1) of the Act has a limited or restricted interpretation and is not applicable to shebaitship which is recognised as property in Hindu Law and that succession to shebaitship even though there is an ingredient of office in it follows succession to ordinary secular property. It was held that it is the general law of succession that governs succession to shebaitship as well and that while the general law has now been changed by reason of the Act, there was no reason why the law as it stands at present should not be made applicable to the case of devolution of shebaitship. That in a suit by Hindu widow for a share in a mortgage debt under the Hindu Women's Rights to Property Act (before it was amended in Madras in 1947), the widow would be entitled to her share as the mortgage debt is partible was the point decided in *Veerayanna* v. *Venkanna*[4]. A Full Bench has ruled in *Ramaiya Konar* v. *Mottayya Mudaliar*[5], that a Hindu married woman living in adultery at the time of her husband's death is disqualified by reason of her unchastity from succeeding to his interest in the joint family property under section 3 of Hindu Women's Rights to Property Act. In coming to the above conclusion it was pointed out that the Act has not expressly or by necessary intendment done away with the personal disqualification, like unchastity imposed by Hindu Law on widows claiming to succeed to the estate of their deceased husband, and it was further remarked that the significance of the words "to the contrary" following the words 'notwithstanding any rule of Hindu Law' in section 2 of the Act is that it is only such rules of Hindu Law as are contrary to provisions of section 3 of the Act, that stand abrogated and that there was nothing in section 3 of the Act prescribing a rule contrary to the well-established rule of Hindu Law that the chastity of a widow is a condition precedent to her inheriting the estate of her husband.

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1. (1951) 2 M.L.J. 39.
2. (1951) 1 M.L.J. 49.
3. 1951 S.C.J. 395.
4. (1951) 1 M.L.J. 364.
5. (1951) 2 M.L.J. 314 (F.B.).

Mahomedan Law:

In considering the place of suing by a Mahomedan wife in respect of interim maintenance where her husband had pronounced an irrevocable *thalak*, it was held in *Mahommed Ibrahim* v. *Jaithoon Bivi Ammal*[1], that an irrevocable *thalak* only terminates the wife's right to conjugal relationship and makes the venue for filing a suit for restitution of conjugal rights, if any, subsist at the place where the *thalak* was pronounced. But as the right to interim maintenance and the return of clothes and jewels arises out of the irrevocable *thalak* it stands on a different footing. The wife can file the suit at the place where she resides at the time of the divorce and receives notice thereof.

Insolvency Law.

According to the decision in *Seeram Appali Raju* v. *O.R., West Godavari*,[2] an order for payment made on an application under section 4 of the Provincial Insolvency Act is tantamount to a decree and if after an annulment of the adjudication the insolvent fails to apply for execution and three years elapse, the Official Receiver cannot on the setting aside of the annulment seek to execute the decree. As regards the right of a person to apply under Or. 1, r. 10, Civil Procedure Code for being added as a party to a creditor's petition it was pointed in *Jaleel Sahib* v. *Seeniappa Ramaswamy Mudaliar*,[3] that under section 5 of the Provincial Insolvency Act the Court exercising insolvency jurisdiction can follow the procedure prescribed by the Civil Procedure Code only where there is no procedure prescribed in the Act with regard to a particular matter but not when it is provided for in the Act. As a definite provision for substitution of a party has been provided in section 16 of the Act, it was held that that a creditor aggrieved by the conduct of the petitioning creditor can come in only by way of a substitution petition under section 16 of the Act and not under Or. 1, r. 10 of Civil Procedure Code to be added as a party. *In Venkatanarasu* v. *Venkatarangayya*[4], it was held that as the Provincial Insolvency Act in the case of the insolvency of a Hindu father makes no distinction between the share of the father and his right and capacity to sell his sons' shares, the control which the Official Receiver would have over the moneys realised from both the categories would be the same and those funds would be at his disposal for payment of the creditors of the insolvent and if any surplus is left, it will revert to the joint family unless there has been in the meantime a disruption of the family. Where during the pendency of a suit for the specific performance to execute a mortgage a petition is filed to adjudicate the defendant as an insolvent and an *ex parte* decree is passed and the defendant is subsequently adjudicated insolvent the decree for specific performance would not be binding on the Official Receiver who was not a party to the suit—*O.R., East Tanjore* v. *Sait Jessasingh Chaturbhuj das*[5]. In *Kolandayammal* v. *Sinna Velappa Goundan*[6] the Provincial Insolvency (Amendment) Act, 1948, (which added section 28-A) was held to be *intra vires* the Dominion Legislature. In considering the scope of section 28-A of the Provincial Insolvency Act it was pointed out in *Seethayya* v. *Venkanna*[7], that it is wrong to think that section 28-A by recognizing retrospectively the power of the Official Receiver in the case of insolvency of the father to dispose of his son's share in the right of the father, saves the bar of limitation against the son.

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1. (1951) 1 M.L.J. 449.
2. (1951) 1 M.L.J. 551.
3. (1951) 1 M.L.J. 87.
4. (1951) 1 M.L.J. 145.
5. (1951) 1 M.L.J. 200.
6. (1951) 2 M.L.J. 438.
7. (1951) 2 M.L.J. 299.

In *Sambayya* v. *O.R., Guntur*[1], it was held that the mere order on an execution petition sending for the moneys of the judgment-debtor would not tantamount to an order realising the assets within the meaning of section 51 (1) of the Provincial Insolvency Act and that therefore when a petition to adjudicate the judgment-debtor is filed a few days after such an order and the money is not in fact received by the Court before the date of partition, the prior order sending for the moneys of the judgment-debtor cannot have the effect of bringing into operation the exception referred to in the section. Though a mortgage is annulled under sections 53 and 54 of the Provincial Insolvency Act as not fully supported by consideration and as intended to be a fraudulent preference of some creditors over others, according to the decision in *Venkatarama Naicker* v. *Ramaswamy Naicker*[2], the mortgagee under that mortgage could rely on the debts included in the mortgage deed and prove those debts in insolvency as an unsecured creditor. The Full Bench in *Official Receiver of Ramanathapuram* v. *Chellappa Chettiar*[3], has ruled that neither a creditor nor an Official Receiver is a "person aggrieved" by a decision of the Insolvency Court declining to make a complaint against a debtor under section 70 of the Provincial Insolvency Act and has no right of appeal under section 75 (1) of the Act. But it was also remarked that the case of a debtor against whom a complaint is made might stand on a different footing. Where a debt has been settled or given up years ago, any dividend claimed or taken away in respect of such a debt can be ordered to be put back into Court, even if the law is, that the dividend paid in respect of a genuine and subsisting time-barred debt cannot be claimed was the point decided in *Venkatasubbamma* v. *Venugopal Rao*[4].

Property Law.

According to the decision in *Parvathathammal* v. *Sivasankara Bhattar*[5], where property is in the actual possession of a usufructuary mortgagee it behoves a prospective purchaser to ascertain what all rights the person in actual possession really has in respect of the property and that if he omits to do so, and if equities exist in favour of the person in possession (for instance an agreement for sale of the property), the prospective purchaser would be bound then. The omission to make enquiries would in such a case amount to wilful abstinence or gross negligence on the part of the purchaser. One of the points decided in *Palaniappa Goundan* v. *Nellappa Goundan*[6], was that the right of a minor to question an excessive or improper alienation by the guardian, is a valuable right in the nature of property and is not a mere right to sue and as such can be validly transferred. The question whether on a purchase of *agricultural* land by private sale, the land being under a lease at the time of the sale, the rent can be apportioned between the buyer and seller under section 36 of the Transfer of Property Act came to be dealt with in *Poongavanam Pillai* v. *Subramania Pillai*[7]. After pointing out that rents and profits accruing due *before* the transfer are not legal incidents of the property transferred and if they are to be transferred, they must be assigned separately it was held that if a different intention is expressed, section 36 will have no application or if a different intention can be implied then also section 36 will have no application and that where the two above conditions do not exist, then the transferor will be entitled to the rents and profits accruing *before* the transfer and the transferee to the rents and profits *after* the transfer

1. (1951) 2 M.L.J. 271.
2. (1951) 2 M.L.J. 32.
3. (1951) 2 M.L.J. 87 (F.B.).
4. (1951) 1 M.L.J. 468.
5. (1951) 2 M.L.J. 191.
6. (1951) 1 M.L.J. 265.
7. (1951) 1 M.L.J. 69.

and the passing of the ownership to him. Such rents and profits should be apportioned under section 36, which applies to agricultural rents also. In *Subbayya* v. *Ramalakshmi*[1], it was laid down that whether a suit for maintenance is by Hindu widow or by a Hindu wife, if a charge is asked for in respect of specified property and a decree is made creating a charge, section 52 of the Transfer of Property Act would apply so as to protect the plaintiff against transfers effected *pendente lite*. The scope and applicability of section 92 (3) of the Transfer of Property Act came in for a good discussion in *Shanbatta* v. *Narayana Bhatta*[2] and the point decided was that where on a partition between the branches of a mortgagor joint family one branch is allotted more property on its undertaking to discharge the whole of the pre-partition mortgage and that branch creates a mortgage over its share (to discharge the pre-partition mortgage) with a covenant that the new mortgagee would be entitled to be subrogated to the rights of the redeemed mortgagees the last mortgagee would be entitled to be subrogated to the rights of the prior mortgagee. In coming to the conclusion on the facts, one of the points decided was that the fact that there was an agreement between the mortgagors *inter se* would not take away the right of subrogation of the subsequent mortgagees, if the requirements of section 93 (2) of the Act have been fully satisfied. Another point decided was that it cannot be said that an agreement with only one of the earlier mortgagors would not entitle the person advancing the money to be subrogated to the rights of the mortgagee whose mortgage has been redeemed and that the word "mortgagor" in section 92 (3) means a mortgagor in the singular or plural according to the circumstances. The last point decided was that a co-mortgagor is entitled to redeem the mortgage either from and out of his funds or with money borrowed from others and there is no reason or justification for denying the co-mortgagor the right to give an agreement to his lender as contemplated by the third paragraph of section 92 of the Act. The Supreme Court has ruled in *Ram Kumar Das* v. *Jagdish Chandra Deo*[3], that the rule of construction laid down by section 106 of the Transfer of Property Act to be applied when there is no period agreed upon between the parties applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession and acceptance of rent and other circumstances. The conditions for the applicability of section 116 of the Transfer of Property Act were stated by the Supreme Court in *Karnani Industrial Bank* v. *Province of Bengal*[4]. According to the decision, two things are necessary: (1) the lessee should be in possession after the termination of the lease and (2) the lessor or his representative should accept rent or otherwise assent to his continuing in possession. It was pointed out that the use of the word "otherwise" suggests that the acceptance of rent by the landlord has been treated as a form of his giving assent to the tenant's continuance of possession. According to the Lordships of the Supreme Court what is contemplated is that the payment of rent and its acceptance should be made at such a time and in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession. The amended section 119 of the Transfer of Property Act came in for examination in *Sitaramiah* v. *Kanakiah*[5], and while pointing out that at the same time it enlarges and limits the scope of the previous section, it was held that under the amended section the right to the return of the thing transferred is limited only to the three classes of persons specified therein and that so long as they continued to be in possession of the same. The result of so holding in

1. (1951) 1 M.L.J. 143.
2. (1951) 1 M.L.J. 596.
3. 1951 S.C.J. 813.
4. 1951 S.C.J. 407.
5. (1951) 1 M.L.J. 701.

that case was that the relief was held to be not available where persons in possession were found to be trespassers and not either the original parties or their legal representatives or transferees from them without consideration. The Judge in deciding so felt that there may be a lacuna but that on the wording of the section that was the only construction possible.

Madras Agriculturists Relief Act.

In *Krishnamurthi* v. *Venkateswaran*[1], it was held that the provisions of the Madras Agriculturists Relief Act were not repugnant to any of the provisions of the Constitution of India and were certainly *intra vires* thereof. A Full Bench in *Arunachalam Chettiar* v. *Narayanaswami Gounder*[2] has held that a debtor who was an insolvent on 1st October, 1937 and also on 22nd March, 1938, but whose adjudication was subsequently annulled has a saleable interest in the property on the crucial dates with reference to his status as an agriculturist. According to the decision in *Venkatappayya* v. *Punnayya*[3], "interest" as defined in section 3 (iii-a) of the Madras Agriculturists Relief Act would mean anything paid or intended or agreed to be paid over and above the principal sum borrowed and that where produce delivered by the debtor to the creditor is of higher value, would certainly be a thing paid in excess of what has been borrowed and the excess would be interest within the meaning of the section. It was pointed out that sub-cl. (iii-a) of section 3 cannot be construed in the light of Expln. II added to section 8 of the Act.

Madras Estates Land Act.

The decision in *Janakirama Sastri* v. *Gopalam*[4], makes it clear that the words "any inam village" in section 3 (2) (*d*) Estates Land Act mean a whole village granted in inam and not anything less than a village, however big a part it may be of that village, and that the definition of "village" in section 3 (19) cannot be incorporated into the definition of an "estate" in section 3 (2) (*d*). According to *Province of Madras* v. *Arunachalam Chettiar*[5], the Legislature has not intended to confer on revenue officers jurisdiction to decide questions of title to properties, and under section 20-A, though the Collector may no doubt hand over the land which he decides is not required for any communal purpose to the owner he cannot decide any dispute *inter se* between the landholder and the government in respect of the title to the property, for the question is one which is within the exclusive jurisdiction of the civil Courts.

Contracts.

With reference to an amount advanced on a promissory note for the purpose of celebrating a marriage opposed to the provisions of the Child Marriage Restraint Act, 1929, it is held in *Srinivasa Rao* v. *Raja Ram Mohana Rao*[6], that the money cannot be recovered as the purpose of the borrowing was unlawful and would fall within the scope of section 23 of the Contract Act. The distinction between wagering contracts and speculative contracts is adverted to in *Rangayya* v. *Narayana*[7], which points out that in the former, one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature ; and there is no intention on the part of either party to deliver or take possession of the commodities and no obligation on either to do so, there being an understandin that

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1. (1951) 2 M.L.J. 366.
2. (1951) 1 M.L.J. 35 (F.B.).
3. (1951) 1 M.L.J. 21.
4. (1951) 2 M.L.J. 272.
5. (1951) 1 M.L.J. 254.
6. (1951) 2 M.L.J. 264.
7. (1951) 2 M.L.J. 393.

the buyer has only to receive from or pay to the seller the difference between the price of the bargain and the price at some future date. According to *Muthayee Achi* v. *Subbiah Chettiar*[1], the promise to which section 25 (3) refers does not require that the promisor should have known that the debt is barred and yet made the promise to pay. In *Shanmugasundara Mudaliar* v. *Sivalinga Mudaliar*[2], the distinction between a remission in *praesenti* which is suspended until a certain future event happens and an agreement in *futuro* is explained and it is held that the latter clearly requires consideration.

Company Law.

According to *Price* v. *Chandrasekharan*[3], a company incorporated under the Indian Companies Act can come to an end only in the manner provided by the Act and not by any change in the management, for instance, by the debenture trustees carrying on the business; also an incorporated company as such cannot be the subject of a mortgage or conveyance. In *S.V.S. Nidhi, Ltd., Vellore* v. *Daivasigamani Mudaliar*[4], it is pointed out that the general body of shareholders is competent by special resolution to fix qualifications for directors other than or in addition to the holding of shares and there is nothing in the Companies Act militating against it. The decision in *Rathnavelusami Chettiar* v. *Manickavelu Chettiar*[5], holds that a suit by a person for a declaration that he has not ceased to be the managing director despite a resolution by the shareholders removing him from the post at a meeting the validity of which was challenged, is maintainable as a suit in respect of an individual wrong and not a wrong in which all the shareholders generally and as a body were interested. According to *Ananthalakshmi Ammal* v. *The H.I. & F. Trust, Ltd.*,[6] section 79 (1) (*e*) of the Companies Act must override any provision inconsistent with it in the articles of association of a company and if a shareholder's name has been entered in the register of shareholders he cannot be prevented from enjoying the right to vote on the ground that his name has not been on the register for any specified time as required in the articles of association. *Ananthalakshmi Ammal* v. *T. B. Asbestos & Paints Ltd.*[7], decides that inasmuch as section 76 confers on the Court power to call or direct the call of a general meeting of the company and section 79 (3) contemplates the giving of directions by the Court as to the manner in which the meeting should be held and conducted, the Court will have power to appoint a person to conduct the meeting who would be the chairman to preside over it. In *Lakshmi Narasa Reddi* v. *O. R. Sree Films Ltd.*[8], it is pointed out that section 101, referring to conditions for applications for and allotment of shares applies only to public companies and not to private companies and it is not necessary to produce the order of allotment to prove the validity of an entry in the register of shareholders. As to the liability of a member of the company to be included in the list of contributories under section 156, it states that it arises not *ex contractu* but *ex lege* and flows by virtue of the appearance of his name in the register of members and therefore it would be no answer for the contributory against the claim of the company to contend that the allotment is void or that he has sold his shares to another; and in the absence of a rectification of the register by an application under section 38, the liability becomes absolute. The decision further holds that mere dishonourable conduct, like a person nominally applying for shares in order to inveigle other real shareholders into subscribing for shares, will not be a bar to a consideration of the legal objections urged by him to be made liable as contributory or as shareholder. According to *Raja of Vizianagaram* v. *Official Liquidator, Vizianagaram Mining Co., Ltd.*,[9] a foreign creditor is as much entitled to a share in the assets of an unregistered company in liquidation as a creditor resident in the country where the unregistered company is situated, neither the nationality

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1. (1951) 1 M.L.J. 573.
2. (1951) 1 M.L.J. 202.
3. (1951) 2 M.L.J. 185.
4. (1951) 1 M.L.J. 18.
5. (1951) 1 M.L.J. 5.
6. (1951) 2 M.L.J. 19.
7. (1951) 2 M.L.J. 586.
8. (1951) 1 M.L.J. 488.
9. (1951) 2 M.L.J. 535.

of the creditor nor the situs of the debt being material; and hence proof of the debts of foreign creditors cannot be expunged. Also where there is a mortgage or charge on the stock in trade of a company, which is movable property, registration under section 109 (1) is necessary and section 277-D does not take away the compulsory nature of the registration. The decision in *Andhra Paper Mills Co., Ltd.* v. *Anand Brothers*[1] holds that leave of the Court under section 171 is not necessary for setting up a counter claim and set off in a suit by the company in winding up against him, because the principle is the same whether the set off is asserted before the official liquidator or in a claim of the official liquidator in a suit filed by him; and a defendant pleading a set off, is not commencing a suit or other legal proceeding against the company within the meaning of section 171. Where after an award by an Industrial Tribunal and before declaration by Government of the award to be binding an application for the winding up of the Company was made and a provisional liquidator was appointed, and later there was a declaration by Government of the award to be binding and subsequently a winding up order was passed, *Price* v. *Chandrasekharan*[2], holds that the Government declaration is not a legal proceeding for which leave of Court is necessary under section 171. According to *Price* v. *State of Madras*[3], leave under section 179 is not a mere formality and the section is intended to prevent frivolous and wasteful litigation by the official liquidator; but there is nothing improper in the official liquidator *bona fide* believing a claim to be fair to make every preparation for the institution of a suit before applying for sanction; nor need notice of application under section 179 be given to the defendant in the proposed suit.

Specific Relief.

According to *Ramalinga Pillai* v. *Jagadammal*[4], inasmuch as the discretion exercisable under section 22 of the Specific Relief Act is not arbitrary but guided by judicial principles and capable of correction by a Court of appeal, where a decree for specific performance granted by the trial Court is reversed by the appellate Court in disregard of legal principles, the judgment of the lower appellate Court is liable to be reversed in second appeal by the High Court. In *Parvathathammal* v. *Sivasankara Bhattar*[5], it is held that the benefit of the proviso to section 27-A cannot be obtained by a person purchasing property in the possession of a usufructuary mortgagee having an agreement of sale in his favour, the purchaser having failed to make inquiries. The decision in *Andhra University* v. *Lakshmi Manoharam*[6], holds that a suit for declaration of breach of contract lying in the wrongful dismissal of the plaintiff from the defendant's service uncoupled with a claim for damage for such breach but conceived solely for the vindication of his character is maintainable. According to *Indian Mutual Life Association, Ltd.* v. *Commissioner, Corporation of Madras*[7], an applicant for mandamus having other special legal remedies under schedule IV to the Madras City Municipal Act, 1919 in respect of assessment to company's tax under the Act is not entitled to seek remedy by way of mandamus.

Stamp Act.

In *Narayana* v. *Lurudu Mareyya*[8], it is decided that an acknowledgment which does not contain an express promise to pay the debt falls within the first part of Article 1 to Schedule 1 to the Stamp Act and is therefore inadmissible in evidence under section 35 and the prohibition in proviso (*a*) applies to it.

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1. (1951) 1 M.L.J. 340.
2. (1951) 2 M.L.J. 185.
3. (1951) 2 M.L.J. 499.
4. (1951) 1 M.L.J. 64.
5. (1951) 2 M.L.J. 191.
6. (1951) 1 M.L.J. 518.
7. (1951) 1 M.L.J. 706.
8. (1951) 1 M.L.J. 707.

Court-Fees.

According to *Ambika Palayakat Co.* v. *Kannappa Pillai*[1], where in a suit for the recovery of the price of goods sold the defendant claimed damages for breach of warranty, etc., the defendant can claim such damages without paying any court-fee as the amount could be considered in diminution of the price claimed. With reference to suits for redemption where the right to redeem is not in dispute in appeal but only the amount, it is held in *Gopal Pillai* v. *Viswanatha Iyer*[2], that court-fee will have to be paid on the *ad valorem* scale. The decision in *Narasamma* v. *Satyanarayana*[3], is that a suit by a party to a decree which is *ex facie* regular and within the jurisdiction of the Court, to have it declared void against the plaintiff falls within section 7 (iv-A) of the Court-Fees Act. In *Govindarajulu* v. *N. V. T. T. Co-operative Bank*[4], it is held that a suit for a declaration of a sale in execution of an award, made on default in paying mortgage money to a co-operative society, to be opposed to law does not fall within section 7 (iv-A) as the sale certificate is not a document of title securing property which the plaintiff was bound to set aside, and a court-fee of Rs. 100 will be the proper fee. According to *Seshayya* v. *Lakshmamma*[5], where the suit is for the northern half of a particular land it is in fact a suit for a specific portion of that land and court-fee is payable under section 7 (iv) (*d*). In *Parvathi* v. *Makkam Amma*[6], it is held by a Full Bench that a suit for redemption of a kanom like any other suit for redemption of a possessory mortgage can be valued under section 7 (ix) though the plaintiff incorporates a prayer for the taking of accounts and payment of arrears of rent due from the kanomdar; and section 11 is a special provision applicable only to the suits specified therein and cannot be extended analogically to suits on mortgages or for damages. According to *Venkatasubba Rao* v. *Venkata Rao*[7], the question of court-fee should be decided by the Court at the inception before the plaint is taken on file and a scrutiny by a ministerial officer cannot be tantamount to a decision by the Court within the meaning of section 12. In *Sri Thyagarajaswami Devasthanam, Tiruvarur*, In re[8], it is pointed out that a suit to recover possession of land from the tenant after ejecting him and for arrears of rent, with the allegation in the plaint that the defendant is falsely caliming occupancy right but without any claim for a declaration of title is one by the landlord against the tenant whose tenancy was terminated and to recover possession within the meaning of section 7 (xi) (*cc*). *Oruganti Appa Rao*, In re[9], holds that where four anomalous mortgages were of the same date, of the same property, between the same mortgagors and mortgagees, and all of them were usufructuary, it is an exceptional case where it ought to be held that there is only one "subject" within the meaning of section 17.

Limitation.

According to the Full Bench decision in *Kandaswami Pillai* v. *Kannappa Chetty*[10], section 15 (1) of the Limitation Act controls section 48, Civil Procedure Code; the word "prescribed" in section 15 (1) does not mean prescribed by the first schedule to the Limitation Act but would include a case where a period of limitation is prescribed by any general statute like the Civil Procedure Code and even otherwise the period prescribed by section 48 Civil Procedure Code should be deemed to have become a part of the Limitation Act by a process of incorporation in Articles 181 and 182. *Palaniappa Goundan* v. *Nallappa Goundan*[11], holds that the word "guardian" in Article 44 means only a lawful or *de jure* guardian and not a *de facto* guardian and hence the recovery of the property by the minor from the alienee will fall within Article 142 or Article 144. In *Thiruneelakanta Mudaliar* v. *Velayudha Mudaliar*[12],

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1. (1951) 2 M.L.J. 182.
2. (1951) 2 M.L.J. 637.
3. (1951) 1 M.L.J. 436: I.L.R. (1951) Mad. 751.
4. (1951) 1 M.L.J. 192.
5. (1951) 2 M.L.J. 72.
6. (1951) 1 M.L.J. 497 (F.B.).
7. (1951) 1 M.L.J. 73.
8. (1951) 1 M.L.J. 466.
9. (1951) 2 M.L.J. 86.
10. (1951) 2 M.L.J. 668 (F.B.).
11. (1951) 1 M.L.J. 265.
12. (1951) 1 M.L.J. 355.

it is pointed out that a suit by a contingent reversioner filed more than 6 years from the date of the knowledge of adoption by the presumptive reversioner was clearly barred under Article 118. According to *Yagnanarayana Sastri* v. *Lakshminarayana*[1], Article 125 applies to a suit by a reversioner to have a compromise by the limited owner which resulted in an alienation, declared invalid. In regard to the conditions necessary for Article 134-B to apply, *Sanyasamma* v. *Vireswaraswami*[2], holds that it is not the cessation of trusteeship generally that matters but the cessation of trusteeship by means of the three events referred to in the third column of the Article, death, resignation or removal. In *Sivaramachari* v. *Anjaneya Chetty*[3], a Full Bench has taken the view that 'appeal' in clause 2 of column 3 of Article 182 should be confined to an appeal against the decree in the suit and not extended to an appeal from any other interlocutory order in the suit or an appeal in any collateral proceeding. According to *Muthuveeranna Chettiar* v. *Muthuvenkatarama Chettiar*[4], if the execution petition is 'struck off,' 'lodged,' 'recorded' or 'closed,' while yet the reliefs prayed for or some of them remain undisposed of without being covered by final orders granting or refusing those reliefs, the petition will be deemed to continue on the file of the Court. In *Moidin Kutty* v. *Doraiswami Aiyar*[5], it is held that where an execution application is merely closed or struck off, such an order does not terminate the proceedings and a subsequent application can be treated as an application to revive the pending execution application. *Murugesam Chetty* v. *Kanniappa Mudaliar*[6], points out that an order of revivor of a decree on the original side of the High Court against two persons, when made on an application for execution against only one of them does not keep the decree alive as against the other and cannot operate against that judgment-debtor within the meaning of Article 183 of the Limitation Act.

Civil Procedure Code.

In *Lakshminarasamma* v. *Seshayya*[7], it is held that in view of the provisions of section 7 (*a*) (iii), Order 21, rule 82, and Order 38, rule 13, Civil Procedure Code, attachment and sale of immoveable property by a Small Cause Court in execution of its decree cannot be made without transfer of the decree to the original side. *Satyanarayanamurthi* v. *Narayanamurthi*[8] decides that the right of suit under section 9 cannot be taken away by a rule made under a power conferred by a scheme framed for the administration of a school, and any such rule providing an optional remedy by way of appeal to the general committee against any order of dismissal of a teacher cannot take away the right of the aggrieved person to go to a civil Court for an adjudication on his right to continue as a teacher in the school on the ground that his dismissal was void. An interesting pronouncement on the principle of *res judicata* is to be found in *Sarangapani Aiyangar* v. *Narasimhacharyulu*[9], where it is held that section 11 is not an exhaustive statement of the doctrine of *res judicata* and the principle has a wider application than is warranted by the strict language of the section and that where a suit by a reversioner for a declaration of settlement made by the daughter of last male holder as not binding on the reversion had been decreed in a subsequent suit for recovery of possession on the death of the daughter the earlier decision would operate as *res judicata* only so far as the binding character of the settlement is concerned but not so as to bar the trial of the question whether the plaintiff is the next heir to succeed to the estate of the last full owner. According to *Ramamirtham* v. *Rama Film Service*[10], section 15 has no application to the High Court exercising ordinary original jurisdiction when there is a conflict between the original jurisdiction of the High Court and the City Civil Court constituted under the Madras City Civil Courts Act. The decision in *Srirangam Municipality* v. *Palaniswami Pillai*[11],

1. (1951) 1 M.L.J. 502.
2. (1951) 2 M.L.J. 391.
3. (1951) 2 M.L.J. 245 (F.B.).
4. (1951) 1 M.L.J. 198.
5. (1951) 2 M.L.J. 506.
6. (1951) 2 M.L.J. 194.
7. (1951) 1 M.L.J. 150.
8. (1951) 2 M.L.J. 333.
9. (1951) 2 M.L.J. 464.
10. (1951) 2 M.L.J. 121 (F.B.).
11. (1951) 1 M.L.J. 281.

makes it clear that it cannot be said that every application under section 24 when made to the High Court should be made on the original side, and that an application under the section can be validly heard and disposed of by any Judge deputed by the Chief Justice to hear such applications and also that section 24 gives power to the High Court to transfer a suit to itself and afterwards retransfer it for trial to the Court in which it was originally filed after passing an interim order. In *Kondayya* v. *Official Receiver, Nellore*[1], it is held that the High Court has no power under section 24 (1) (*b*) to transfer an Insolvency Petition pending in a subordinate Court in the moffussil to the original side of the High Court. With reference to an order under section 20 of the Madras Agriculturist Debtors Relief Act, it is pointed out in *Desikachariar* v. *Ramachandra Reddiar*[2], that it complies with the characteristics of a decree and relates to its execution between the parties to the suit and is hence covered by section 47, Civil Procedure Code. *Kunhikoya Thangal* v. *Ahmad Kutty*[3], decides that an attempt to restrain the action of a judgment-debtor in cutting and selling trees on land in regard to which there is a decree for redemption of a kanom thereon, is not a matter relating to the execution, discharge or satisfaction of the decree and section 47 cannot apply. In *Vyravan Chettiar* v. *Nagaswami Aiyar & Co.*[4], it is held that under section 48, the computation of the period of 12 years should be made from the date of the appellate decree and an order dismissing an incompetent appeal cannot give a fresh starting point for the purposes of the section. A decision of much importance is *Kandaswami Pillai* v. *Kannappa Chetty*[5], holding that section 48 is controlled by section 15 (1) of the Limitation Act and that the period of 12 years mentioned in section 48 is a period of limitation. In *Kuttalalingam Pillai* v. *Chinnakannu Pillai*[6], it is held that according to the amended section 51 a Court must record its reasons in writing regarding its being satisfied that the judgment-debtor had rendered himself liable to be arrested and sent to the jail before directing his arrest and detention, and reasons should be given every time a man is ordered to be arrested and in every proceeding where he is ordered to be arrested. *Abu Packer* v. *P. S. Kurup*[7], decides that before an order for arrest is made under section 51, the judgment-debtor should be given an opportunity of showing cause why he should not be arrested. In *Karunambal Ammal* v. *Chellayya Gurukkal*[8], it is held that the earnings of the heirs of a gurukkal in a temple which are in the shape of presents by devotees for archakatvam service rendered by them are not liable to be attached as assets of the deceased gurukkal in their hands under a decree passed against them with reference to such assets. According to *Dhanlakshmi Ammal* v. *Krishnamurthi*[9], where the judgment-debtor—husband—in a maintenance decree had been committed to a prison for six months in an execution petition relating to costs and movables, and has been there for the entire period prescribed by section 58 (1), he cannot in another execution petition for recovering maintenance since accrued be again sent to prison for recurring periods of six months for recurring maintenance amounts for later periods. *Vyravan Chettiar* v. *Nagaswami Aiyar & Co.*[4], holds that the fact that the purchaser did not take possession could not confer on him higher right than that which flows from section 65. The decision in *Suryanarayana* v. *Venkatasubba Rao*[10], points out that the rule of law enacted in section 82 of the Trusts Act does not affect the provisions contained in section 66, Civil Procedure Code, that the latter section lays down an embargo on the plea of benami when it forms the basis of a suit by a person claiming to be the real owner against court auction-purchaser alleged to be a benamidar, and that as the section places a procedural bar to the enforceability of a claim based on benami which is otherwise quite legal and valid, the section will have to be construed strictly. In *Sankunni Menon* v. *South Indian Railway*[11], it is held that though section 80 is mandatory the Court

1. (1951) 1 M.L.J. 97 : I.L.R. (1951) Mad. 763.
2. (1951) 1 M.L.J. 23.
3. (1951) 2 M.L.J. 399.
4. (1951) 1 M.L.J. 298.
5. (1951) 2 M.L.J. 668 (F.B.).
6. (1951) 2 M.L.J. 588.
7. (1951) 2 M.L.J. 175.
8. (1951) 2 M.L.J. 395.
9. (1951) 1 M.L.J. 515.
10. (1951) 2 M.L.J. 76.
11. (1951) 1 M.L.J. 463.

should not be hypercritical in examining the language used and should interpret it in a free and liberal spirit. According to *Sambayya* v. *Subba Reddi*[1], in order to enable a party to file an interpleader suit, the party should be in a position to walk out of the suit with a mere claim for costs and should not be entitled to have any other matter of contest between himself and the claimant. With reference to sections 109 and 110, Civil Procedure Code, a Full Bench has held in *Saraswathi Ammal* v. *Rajagopal Ammal*[2], that where several appeals are preferred against the decree in the same suit by different parties they should be heard together, and there can be only one decree of the High Court as an appellate Court embodying the decision in the several appeals which decree would supersede the decree of the trial Court. *Swaminatha Pillai* v. *Balasubramanya Udayar*[3], decides that interference under section 115 will not be permissible against an order rejecting an application for leave to appeal in *forma pauperis*. In *Abboy Reddiar* v. *Collector of Chingleput*[4], it is held that a revision will not lie against the order of an arbitrator appointed under section 19 (2) of the Defence of India Act as a *persona designata*, merely because a right of appeal is provided against its award. According to *Satyanarayanacharlu* v. *Ramalingam*[5], where an order directing payment of additional Court-fee in a suit is not complied with and it is followed by an order rejecting the plaint, the proper remedy is only by way of an appeal against the decree and a revision would not be maintainable. In *Moidin Kutty* v. *Doraiswami Aiyar*[6], it is recognised that though the receiver is not the owner or agent of the owner, he is yet his statutory representative and as such has a right to continue execution proceedings under section 146. *Kumaraswami Goundan*, In re[7], holds that even if section 151 by itself may not apply to proceedings under the Madras Buildings (Lease and Rent Control) Act, 1946, a quasi-judicial tribunal like the Rent Controller will have inherent jurisdiction to set right mistakes made by inadvertence and that will not amount to a review of adjudication already made. In *Ammiraju* v. *Kondalarayudu*[8], it is pointed out that sections 151 and 153 are not intended to inquire into titles of parties to properties. *Venkateswarlu* v. *Subbayya*[9], decides that the powers under section 151 can only be exercised *ex debito justitiae* and not on the mere invocation of parties or volition of Courts and so cannot be exercised to direct parties to submit to a blood test by experts where a question of legitimacy has been raised in a suit. *Fernanda* v. *Ratnasami Nadar*[10], lays down that there is nothing in law preventing a court from giving a short time in the exercise of its powers under section 151. In *Arumugha Naicker* v. *Kuppuswami Pillai*[11], it is held that a representative action under Order 1, rule 8, can be brought for rendition of accounts by certain members of an unregistered society on their own behalf and on behalf of the other members of the society. In regard to the remedy available to a creditor aggrieved by the conduct of the petitioning creditor in insolvency, it is stated in *Jaleel Sahib* v. *Seeniappa Ramaswami Mudaliar & Co.*[12], that he should come only by way of a substitution petition under section 16, Provincial Insolvency Act and not under Order 1, rule 10, Civil Procedure Code, to be added as a party, there being a specific provision covering the matter. In *Sivanarayana Reddi* v. *Nagasubbamma*[13], it is pointed out that it cannot be said that negligence of guardian to appear and defend on behalf of the minor is not a 'sufficient cause' under Order 9, rule 13. In *Basavayya* v. *Guravayya*[14], a Full Bench holds that even after the passing of a preliminary decree in a partition suit the Court has power to give appropriate directions regarding all or any of the matters either *suo motu* or on application and nothing in Order 20, rule 18, militates against that. The decision in *Seetharamayya* v. *Pattayya*[15], recognises that a decree for demolition of a wall and delivery of land and payment of costs can be the subject of adjustment which

1. (1951) 1 M.L.J. 353.
2. (1951) 2 M.L.J. 63 (F.B.).
3. (1951) 1 M.L.J. 472.
4. (1951) 2 M.L.J. 402.
5. (1951) 2 M.L.J. 74 (F.B.).
6. (1951) 2 M.L.J. 506.
7. (1951) 1 M.L.J. 422.
8. (1951) 1 M.L.J. 682.
9. (1951) 1 M.L.J. 580.
10. (1951) 1 M.L.J. 425.
11. (1951) 2 M.L.J. 564.
12. (1951) 1 M.L.J. 87.
13. (1951) 2 M.L.J. 418.
14. (1951) 2 M.L.J. 176 (F.B.).
15. (1951) 1 M.L.J. 577.

can be pleaded in bar of execution under Order 21, rule 2, though uncertified, and the mere award of costs would not make it a portion of the complex decree proper and there was no reason why the decree-holder should not proceed with execution as to costs. According to *Kattikoolathil Mammu* v. *Vinayaka Kamath*[1], a person who has attached property has certainly got interest in seeing that the property is not alienated or otherwise transferred, and so an attaching creditor has got an interest in the property sufficient to enable him to make a deposit under Order 21, rule 89. *Marimuthammal* v. *Thandavaraya Naicken*[2], holds that Order 21, rule 95, has no application to a case where the persons in possession are neither judgment-debtors nor persons claiming title created by them but are only trespassers and a suit by a stranger auction-purchaser for recovery of possession from a trespasser will not be barred. *Doraikannu Asari* v. *Nataraja Chetty*[3], recognises that a person purchasing property in dispute during pendency of an appeal cannot be impleaded as a party to the appeal under Order 22, rule 10, though his interests might be prejudiced by any compromise reached by the parties especially where the genuineness and validity of the assignment is disputed and an enquiry into those questions is foreign to the scope of the appeal. In *Veeraswami* v. *Lakshmadu*[4], it is held that when the plaintiff files a petition to withdraw the suit with permission to file a fresh suit regarding the same subject-matter and the liberty is refused the Court should retain the suit for trial in the usual course. According to *Johara Bibi* v. *Mohamad Sadak Thambi Marakayar*[5], an agreement by a Muslim mother to refer a dispute relating to her minor son to arbitration is *ab initio* void as she is neither a legal nor a Court guardian and the question of voidability under Order 32, rule 7 (2), cannot arise. *Kamalamma* v. *Venkata Sastri*[6], decides that with regard to suits within the scope of Order VII, of the Original Side Rules, Order 37, rule 4, Civil Procedure Code, has no application and in view of the vital differences between Order 37, Civil Procedure Code and Order 7 of the Original Side Rules the latter should be deemed to supersede the former regarding suits on negotiable instruments within the scope of Order 7 of the Original Side Rules. In *Narayana Dossji Varu* v. *M. H. R. E. Board*[7], it is held that the words 'such other order' in Order 39, rule 1, do not contemplate the appointment of a receiver. The decision in *Venkataramana Aiyar* v. *Unnamalai Ammal*[8], recognises that notwithstanding the fact that after an order of remand the suit was disposed of, the party aggrieved by the order of remand would have a right of appeal against the order of remand. *Thirumalaiswami Mudaliar* v. *Periaswami Mudali*[9], points out that an order of remand made without coming to the conclusion that the decision of the trial Court is wrong is illegal and after the Madras amendment to Order 41, there is no residuary power in an appellate Court to order a remand apart from Order 41, rule 23. In *Arjan Singh* v. *Kartar Singh*[10], the Supreme Court holds that the discretion to receive and admit additional evidence is not arbitrary but judicial, circumscribed by the limitations specified in Order 41, rule 27, and under that provision it is the appellate Court that must require the evidence to enable it to pronounce judgment. According to *Swaminatha Pillai* v. *Balasubramania Udayar*[11], it is not even necessary for the appellate Court to hear the petitioner in a pauper appeal before rejecting the appeal under Order 44, rule 1 or grant the appellant time for paying the Court-fee. In *Chinnaswami* v. *Veerappa Chettiar*[12], it is held that where after an appeal had been filed in the Supreme Court the appellant fails to furnish security and also the deposit towards defraying charges of printing, he cannot escape the consequences of cancellation of certificate by relying on the fact that Order 45, Civil Procedure Code, had not been suitably amended, by the High Court. The decision in *Krishna Aiyar* v. *Narayanan*[13], states that Order 47,

1. (1951) 1 M.L.J. 420.
2. (1951) 2 M.L.J. 485.
3. (1951) 2 M.L.J. 26.
4. (1951) 1 M.L.J. 194.
5. (1951) 2 M.L.J. 56.
6. (1951) 1 M.L.J. 676.
7. (1951) 1 M.L.J. 62.
8. (1951) 1 M.L.J. 474 : I.L.R. (1951) Mad. 825.
9. (1951) 2 M.L.J. 532.
10. (1951) S.C.J. 274 : (1951) 1 M.L.J. 556 (S.C.).
11. (1951) 1 M.L.J. 472.
12. (1951) 2 M.L.J. 197.
13. (1951) 1 M.L.J. 187.

rule 1, is clearly not intended to enable a Judge to write a second judgment reversing his first because on fuller arguments and further consideration he thought that the view he had first taken was wrong.

Criminal Procedure Code.

According to *Meyyammai Achi* v. *Venkatachalam Chettiar*[1], where a magistrate has issued a search warrant under section 96, Criminal Procedure Code, without giving any reasons and it does not appear that he had exercised his judicial mind in the matter, the order is liable to be quashed. The scope of section 144 is explained in *Bandi Butchiah*, In re[2], which holds that mere defamatory statements and even highly objectionable abusive articles against prominent government officials cannot be dealt with under section 144 but that prosecutions for the substantive offences committed are the correct steps to take in such cases. In *Abu Sayed Sahib* v. *Ahmed Mohideen Sahib*[3], it is held that 'land' in section 145 is used as synonymous with immoveable properties which include things attached to the earth, and thus a dispute though it may relate to a mill really includes the dispute to the land in which it is situate and section 145 will apply. *Akkuliya Naidu* v. *Venkataswamy Naidu*[4], points out that a proceeding under section 145 constitutes a prosecution which would sustain an action for damages for malicious prosecution. The decision in *Chenchu Narayana* v. *Karrapati Kesappa*[5], is that section 145 (1) does not contemplate any sustained inquiry before the making of the preliminary order and that the two months' period contemplated in the proviso to sub-section 4 should be deemed to be from the date when the petition was presented. According to *Ramiah* v. *Nachiappa Chettiar*[6], inasmuch as an officer appointed under section 145 (4) has not got the same powers as a receiver under section 146, his powers are limited to taking into custody of what is on the land and disposing of it under the orders of the magistrate. In *Guruswami Naidu* v. *Guruswami Naidu*[7], it is held that gossip, rumour or hearsay would no doubt not ordinarily fall within the scope of section 154, but if some one goes to a police station and definitely tells the officer in charge that a cognisable offence has been committed, and that statement is made with a view to induce the police officer to inquire into the matter, it is 'information' within the meaning of section 154. *Venkataratnam*, In re[8], takes the view that under section 161 (3) the police officer may reduce to writing any statement made to him in the course of investigation, and if he does so he shall make a separate record of the statement of each of such persons, and that the failure to do so would be to violate a mandatory provision of law. *Ramaswami*, In re[9], holds that the statutory requirements of section 164 are that a magistrate shall before recording any confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him. According to *Arunachala Goundan* v. *Akhileswara Aiyar*[10], where the charge is one of non-accounting (against an agent collecting moneys) and there is no specific allegation of misappropriation in any particular place, the venue of the trial will be the place where the accounting has got to be done and has not been done. *Sheriff* v. *Govindan*[11], lays down that the expression 'the Court to which appeals ordinarily lie' in section 195 (3), Criminal Procedure Code, has reference to a higher Court to which an *unrestricted* right of appeal against the decisions of an inferior Court are provided, and merely because there is a *limited* right of appeal to the Supreme Court from the High Court under Article 134 (1) of the Constitution it cannot be said that the Supreme Court is a Court of Criminal appeal against the decisions of the High Court and so where the High Court ordered the prosecution of two Sub-Inspectors for an offence under section 193, Indian Penal Code, there is no automatic right of appeal to the Supreme Court under section 476-B, Criminal Procedure Code. *Srinivasa Aiyar* v. *Saraswathi Ammal*[12],

1. (1951) 1 M.L.J. 12.
2. (1951) 2 M.L.J. 374.
3. (1951) 1 M.L.J. 429.
4. (1951) 1 M.L.J. 189.
5. (1951) 1 M.L.J. 102.
6. (1951) 2 M.L.J. 90.
7. (1951) 1 M.L.J. 426.
8. (1951) 1 M.L.J. 430.
9. (1951) 2 M.L.J. 630.
10. (1951) 2 M.L.J. 627.
11. (1951) 2 M.L.J. 501.
12. (1951) 2 M.L.J. 649.

decides that section 198, Criminal Procedure Code, is applicable also where the charge is the abetment of an offence punishable under section 494, Indian Penal Code, and a Court is precluded from taking cognisance of an offence without a complaint from a person aggrieved. *Muthuvadi Ammal*, In re[1] points out that an offence under section 426, Indian Penal Code, is not one covered either by section 198 or section 199, Criminal Procedure Code and therefore in respect of an offence under that section a complaint by an aggrieved person is not essential. *Sagili Solomon*, In re[2], holds that the mere fact that the accused is asked whether he wishes to say anything more in addition to what he had stated in the committing Court is not a sufficient compliance with section 342 and the fact that there was a full and complete questioning of the accused in the committing Court is not sufficient. According to *Guruswami Thevar*, In re[3], a judgment written by a Sessions Judge who heard the evidence in the case, which on the handing over charge of his office to another is pronounced by the successor is a nullity, and section 350 (1) does not apply to sessions trials. In *Lakshmiah*, In re[4], it is pointed out that in an appeal against conviction the appellate Court can alter the finding maintaining the sentence and no prejudice is caused if the Court alters the finding to some other offence of which the accused was charged in the lower Court and acquitted. *Raghava Variar*, In re[5], lays down that the powers of a Criminal Court in revision are even wider than the powers of a civil Court acting under Order 41, rule 33, Civil Procedure Code. *Simhadri Krishnamurthi*, In re[6], decides that where owing to a patent error, there is an acquittal by an Assistant Sessions Judge, it is competent for the Sessions Judge to make a reference to the High Court under section 438, though the government has not filed an appeal against the acquittal under section 417. In *Jogendranath Jha* v. *Shri Polailal Biswas*[7], the Supreme Court lays down that though section 439 (1) authorises the High Court to exercise in its discretion any of the powers conferred on a Court of appeal by section 423, sub-section 4, specifically excludes the power to convert a finding of acquittal into one of conviction and by merely characterising the judgment of the trial Court as perverse, the High Court cannot reverse pure findings of fact based on the trial Court's appreciation of evidence. *Durgaprasada Rao* v. *Sundar Bhatt*[8], states that inasmuch as section 476, applies only to cases falling within section 195 (1) (*b*) and (*c*), Criminal Procedure Code and section 183, Indian Penal Code does not fall under the latter, no complaint for an offence under section 183, Penal Code, can be filed by Court. In *Venkateswara Rao*, In re[9], it is held that there is no provision of law which enables the Court to rehear an application for a writ of *habeas corpus* which had been disposed of on the merits even though the party or counsel was not present at the time it was heard, and since the writ is of a criminal nature no review is allowed in such matters. *Sampath* v. *Govindammal*[10], recognises that it is not necessary that in every case where a husband seeks to recover the custody of his minor wife he should proceed under section 25, Guardians and Wards Act; he has also a remedy under section 491, Criminal Procedure Code. In *K. V. R. S. Mani*, In re[11]: it is pointed out that the Court's discretion under section 540 is very wide, that the very width requires a corresponding caution in using the power; and where the prosecution knowing full well and being in possession of all the materials which can be spoken to by a particular witness and intending to call him as a witness fails to do so, the Court cannot exercise its powers under section 540 to call the person as a Court witness.

End of (1952) 1 M.L.J. (*Journal*).

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1. (1951) 1 M.L.J. 674.
2. (1951) 2 M.L.J. 423.
3. (1951) 1 M.L.J. 549.
4. (1951) 2 M.L.J. 235.
5. (1951) 1 M.L.J. 700.
6. (1951) 2 M.L.J. 270.
7. (1951) 2 M.L.J. 288 (S.C.).
8. (1951) 1 M.L.J. 290.
9. (1951) 1 M.L.J. 11.
10. (1951) 2 M.L.J. 259.
11. (1951) 1 M.L.J. 184.

ARREARS AND THE BAR.

(The Advocate-General, Madras (Sri V. K. Thiruvenkatachari) has sent the following note for publication.)

In the earlier years, the legal journals used to publish judicial statistics and discuss them. Later on some journals used to publish extracts of English statistics. The practice has been discontinued and even the annual Statistics of Civil Courts and Statistics of Criminal Courts published under Government authority in Madras are not reviewed or even noticed in the law journals. I suggest that the legal journals and the Bar through these journals and otherwise should take an interest in the question and actively assist in the solution.

By courtesy of the Registrar of the Madras High Court, I give below the figures of filing and disposal in each of the years 1950 and 1951 and the first quarter of 1952, that is, from January 1, to March 31, :—

YEAR.	F.A.	O.S.A.	C.C.C.A.	L.P.A.	S.A.	C.M.A.	C.M.S.A.	C.R.P.
1950 Filed ..	930	132	107	153	2408	762	243	2146
Disposed ..	682	92	96	130	2314	645	241	2000
1951 Filed ..	784	143	146	215	1911	734	223	2267
Disposed ..	658	115	99	139	2047	495	203	2265
1952 From 1st January to 31st March.								
Filed ..	249	43	46	116	579	196	59	589
Disposed ..	158	23	18	52	443	105	44	551
Pending on 31st March, 1952. ..	3131	227	272	318	6664	1964	523	2480

Four years ago the Court was working without full strength. But that cannot account very much for the pendency. The figures show that, by and large, disposals equal institutions. The problem is the large backlog.

One school advocates restriction of second appeals and revision petitions, making the district courts final; on the other hand bar associations have been raising the question of permitting second appeals on fact where the district judgment is a reversing one. Increasing the number of judges is a logical mathematical solution but does not seem practical politics.

What the Bar can do to help is the question. One suggestion from experience is that if every advocate would examine *his* arrears it will help. We could go through all the cases on our file and scrutinise them. The lapse of time, refusal of a stay or injunction and various other circumstances have rendered some of our cases infructuous. If things are left to take care of themselves, printing goes on, meaning expense to the client and blocking printing of other cases by the Court. Again, there are numerous writ petitions and other cases pending which are governed by decisions already rendered and reported. These cases could be withdrawn or posted for consequential orders. We could make a positive move in the matter instead of waiting for the Registrar to post the cases at a late date. Ever if 5 to 10 per cent. of second appeals and miscellaneous cases and a smaller percentage of first appeals go off the record, the effect will be good, particularly as it results from the Bar taking the initiative.

I suggest that Advocates give their views on the whole question.

V. K. THIRUVENKATACHARI.

[END OF VOL. (1952) 1 M.L.J. (*Journal*).]

THE MADRAS LAW JOURNAL.

1] JANUARY [1951

NOTES OF INDIAN CASES.

VENKATARAMAN, *In re*, (1950) 2 M.L.J. 186.

A matter which was practically *res integra*, and not *res indicata* attracting the operation of *stare decisis*, so far as this country is concerned fell to be decided in the above case. It holds that the High Court has no inherent power to award costs in a *habeas corpus* application under section 491, Criminal Procedure Code. The principle is accepted in England that the highest Court of appeal in the country must have necessarily an inherent jurisdiction as regards costs. In *Guardians of West Ham Union* v. *Church Warden of St. Matthew Bethnal Green*[1], Lord Herschell said: "I see no other foundation on which the power to order their payment can be rested except the inherent authority of the House as the ultimate Court of appeal." Likewise, Lord Macnaghten remarked: "The truth is, as it seems to me, that the House of Lords, as the highest Court of appeal has and necessarily must have an inherent jurisdiction as regards costs." Another principle has been advanced in In re *Bombay Civil Fund Act*, 1882 : *Pringle* v. *Secretary of State for India*[2]. It was there observed by Bowen, L.J.: "I have always understood it to be a broad principle that a Court which is put in motion wrongly has inherent jurisdiction to compel the person who puts it in motion wrongly and who brings an innocent party to answer an unfounded claim or an unjustifiable proceeding to pay the costs." Similarly Cotton, L.J., said: "I think we have jurisdiction to order him to pay all the costs incurred by his asking wrongly for the interference of the Court." In that case, the Bombay Civil Funds Act, 1882, gave jurisdiction to the Court of Appeal to determine questions arising between any subscriber to the Bombay Civil Fund and the Secretary of State as to any liability of the fund, nothing being said as to costs. Pringle took proceedings to enforce a claim against the fund and these were negatived. On the question of costs, the Court took the view set out above. It would thus seem that whether a Court as the highest Court of appeal in the country or not, it will have jurisdiction to award costs if it has been moved wrongly and an innocent party has to answer an unfounded claim. In *Corporation of Burford* v. *Lenthall*[3], Lord Hardwicke, L.C., stated that equity courts had always claimed inherent power to award costs, but the common law Courts did not attempt to assert any such jurisdiction. In criminal proceedings no costs were awarded on the basis of any inherent power, *R.* v. *Jones*[4], *R.* v. *Woodhouse*[5]. Even where the Court is not able to award costs generally it may give the functionary obeying the writ of *habeas corpus* the expenses of bringing up the prisoner, *Dodd's case*[6]. In dealing with cases on *habeas corpus*, the Courts have now power in *civil* cases to award costs by virtue of the provisions of section 5 of the Judicature Act, 1890, *R.* v. *Jones*[4]. That section provides: "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or

1. (1896) A.C. 477.
2. L.R. (1888) 40 Ch.D. 288 (C.A.).
3. (1743) 2 Atk. 550.
4. (1894) 2 Q.B.D. 382.
5. (1906) 2 K.B. 501 (C.A.).
6. (1857) 2 De G. & J. 510 : 44 E.R. 1087.

Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid." Section 5 is to be read along with section 4 which states: "Nothing in this Act shall alter the practice in any criminal cause or matter or in bankruptcy or in proceedings on the Crown side of the Queen's Bench division." So even after the Judicature Act of 1890, the Court follows in criminal causes the pre-existing practice only. The resulting position in English law is: (*i*) the House of Lords has inherent power to award costs as the highest Court in the land; (*ii*) an inherent power to award costs exists in other Courts also if they are put in motion wrongly and innocent parties are made to answer unfounded claims or unjustifiable proceedings; (*iii*) even after the passing of the Judicature Act, 1890, in criminal causes the pre-existing practice continues to operate; and (*iv*) power is given to the Court for the first time by the Judicature Act of 1890 in civil matters to award costs in dealing with cases on *habeas corpus*. Clause 8 of the Madras Supreme Court Charter invested the Supreme Court with the powers possessed by the King's Bench in England. It was, however, pointed out by the Privy Council in *Ryots of Garabanda* v. *Zamindar of Parlakimedi*[1], that such powers are restricted in their application to the city limits only and the High Court cannot issue any writ to run outside the Presidency Town. In *Mahomedalli Allabux* v. *Ismailji Abdulla*[2], Macleod, C.J., was of the view that in spite of the provisions of section 491 of the Criminal Procedure Code, the High Court as successor to the Supreme Court continued to have the power to issue the prerogative writ of *habeas corpus*. This position is not now tenable in view of the ruling of the Privy Council in *Mathen* v. *District Magistrate of Trivandrum*[3], where it was held that the High Court has no longer the power to issue the common law writ of *habeas corpus* in cases falling within section 491 and since that section empowers the High Court to issue such writs within the limits of its appellate jurisdiction the power to issue the common law writ must be deemed to have been abrogated. It follows that the power of the High Court inherited from the King's Bench and now surviving is of a restricted character only. Even assuming for the sake of argument that all the powers of the latter have been inherited and survive, still it is clear from the review of English law given above, that the High Court can have no inherent jurisdiction to grant costs on *habeas corpus* and that the only power it can have can be by specific conferment only. It is well settled in England that in criminal proceedings costs cannot be awarded on *habeas corpus*, though in civil cases the English courts now have power by virtue of the provisions of the Judicature Act of 1890. *Habeas corpus* in English law may be civil or criminal. Whether it is the one or the other is to be determined by the nature of the proceeding in which the order is passed. In *R.* v. *Home Secretary and Minister of Defence of Royal Netherlands Government*: Ex parte *Amand*[4], Lord Wright observed: "It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter." The position in India is not identical. The power to issue the writ now flows from section 491, Criminal Procedure Code. *Prima facie* the provisions of the Code are for Courts of Criminal jurisdiction only, in the absence of anything to the contrary in the context. The term "High Court" in section 491 is to be understood in the light of its definition in section 4 (1) as the highest Court of criminal appeal or revision for any local area. It would thus seem that the civil side of the High Court is not within the contemplation of section 491 and a proceeding under that section will be a criminal proceeding only, though the matter dealt with may be civil in nature. In some cases it has been suggested that a *habeas corpus* proceeding is only a civil

1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. (1944) Mad. 457 (P.C.).
2. (1926) I.L.R. 50 Bom. 616.
3. (1939) 2 M.L.J. 406 : L.R. 66 I.A. 222 : I.L.R. (1939) Mad. 744 (P.C.).
4. (1943) A.C. 147.

proceeding, see *Niharendu Dutt Majumdar* v. *A. E. Porter*[1] where Mitter, J., observed : "A *habeas corpus* proceeding (and a proceeding under section 491 is of the same nature) is in essence a civil proceeding, for it is concerned with the private right of a citizen, namely, the right of personal liberty. The true nature of a proceeding by *habeas corpus* should be determined by its object, which is not to punish, but to give relief from a civil wrong." It is not correct to regard unlawful detention as a civil wrong merely. Nor can the fact that an application under section 491 is not for punishment render it a civil proceeding. In re *Venkatachala Thevar*[2], In re *Venkataraman*[3]. A number of decisions in India have held that proceedings under section 491 are criminal proceedings, In re *Venkatachala Thevar*[2], *Basudeva* v. *Rex*[4]. As to costs, the Bombay High Court has framed rules for the award of costs in proceedings under section 491 but not Madras. In *Ramanammal* v. *Vijayaraghavulu*[5], it was held that the court has no power to give costs in proceedings under section 491. In *Sankaralinga Mudaliar* v. *Narayan Mudaliar*[6], it was held that though a court may have inherent power to grant costs, the power is restricted in the sense that if grant of costs in any type of poceedings is provided for by statute the court cannot extend the powers so granted by invoking its inherent powers ; that unlike the Civil Procedure Code the Criminal Procedure Code has no general provision relating to costs but gives specific power to grant costs in certain cases alone ; and that where in specific instance a statute gives a court power to grant costs and the same statute gives the court its whole criminal jurisdiction, the statute must be read as excluding any other right of granting costs. The decision under review has accepted this view as precluding the grant of costs in proceedings under section 491, Criminal Procedure Code.

RAGHAVAN, *In re*, (1950) 2 M.L.J. 195.

Section 342 of the Criminal Procedure Code provides that in order that the accused may explain any circumstances appearing in evidence against him, the Court shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. The importance of a proper examination of the accused has been stressed both by the Privy Council as well as by the Supreme Court, *Dwarkanath* v. *Emperor*[7], *Tara Singh* v. *The State*[8]. In *Marudamuthu Vannian*, In re[9], the Madras High Court had held that the accused's right to state his case at whatever stage the law permits him to do so is fundamental and cannot be regarded as an irregularity such as is contemplated in section 537, and that the failure to examine the accused after the prosecution witnesses had been called in for further cross-examination was fatal to the validity of the trial. This argument was considered by the Privy Council as proceeding upon too narrow a view of the operation of section 537, *Pulukuri Kotayya* v. *King-Emperor*[10]. And very recently the Madras High Court has held that the object of section 342 is not violated by a failure to examine the accused where the evidence recorded has been in his favour, *Cariappa*, In re[11]. Another aspect of failure to examine the accused had to be considered in the instant case. Section 205 of the Criminal Procedure Code provides firstly that whenever a magistrate issues a summons, he may, if he sees reasons to do so, dispense with the personal attendance of the accused, and permit him to appear by his pleader ; and secondly, that the magistrate inquiring into or trying the case may in his discretion at any stage of the proceedings, direct the personal attendance of the accused, and if necessary enforce such attendance in the manner provided by the Code. In regard to the effect of section 205 on section 342, divergent views have been expressed. In *Maung Po Nyein* v. *Haka*

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1. I.L.R. (1944) 1 Cal. 489, 520.
2. (1948) 2 M.L.J. 76.
3. (1948) 2 M.L.J. 513.
4. A.I.R. 1949 All. 513 (F.B.).
5. (1933) I.L.R. 55 Mad. 1049.
6. (1922) 43 M.L.J. 369 : I.L.R. 45 Mad. 913 (F.B.).
7. (1933) 64 M.L.J. 466 (P.C.).
8. (1951) 2 M.L.J. 291 : (1951) S.C.J. 518.
9. (1922) 43 M.L.J. 402 : I.L.R. 45 Mad. 820.
10. (1947) 1 M.L.J. 219 : L.R. 74 I.A. 65 : I.L.R. (1948) Mad. 1 (P.C.).
11. (1950) 1 M.L.J. 339.

Singh[1], two purdah ladies were being tried before a magistrate and the High Court observed: "I agree with the learned District Magistrate. The women could be permitted to answer the examination through their pleader. Section 342 has to my mind been enacted to safeguard the interests of accused persons". In *Dorabshah Bomanji* v. *Emperor*[2], it was held that where the Court dispenses with the personal attendance of the accused under section 205 it can act upon the plea given by his pleader. Following this, in *Emperor* v. *Jaffar Cassum Moosa*[3], it was held that section 342 must be read subject to section 205. It is of interest to note that in an earlier Bombay case, in *Emperor* v. *Sursing Mathuradas*[4], Batty, J., had remarked that no pleader can be called upon to plead on behalf of his client guilty or not guilty and it would be improper for a magistrate to act on such plea. In the same case, Aston, J., had observed that it would be more regular in form if a magistrate were to call on the accused to say with his own lips whether he denies the truth of the complaint. The later Bombay decisions have regarded this statement of the law as too widely expressed. In *Ishwar Das* v. *Bhagwan Das*[5], it was stated by the Allahabad High Court: "Section 342 is not in the interest only of accused persons. The statement under the section is to explain circumstances appearing in evidence against the accused. The intention of the provision is for the furtherance of justice and to enable the Court to decide the issue in a criminal case, which is always 'Did the accused commit the offence charged?'. The statement should be a personal statement made by the accused and not a statement made on his behalf by an advocate". It was also pointed out that the Court may like to ask questions from the advocate on which he may have no instructions, that the observance of the demeanour of the accused is not possible, and that the statement of the Pleader will be only hearsay. There is much to be said for the view that the statement under section 342 is to be a personal statement of the accused and not one on his behalf and that though a meticulous compliance with section 342 may not be insisted on where the evidence recorded is favourable to the accused still it would be a different thing were the statement made is not personal but on behalf of the accused. In view of the different views held on the matter it is desirable that the matter is authoritatively and finally considered, particularly as the range and sweep of section 342 is likely to come up often.

RAJARATNAM REDDI, *In re*, (1950) 2 M.L.J. 201.

It is held in this case that the abetment of an abetment is an offence though the second abetment is ineffective. Section 108 of the Indian Penal Code defines what is meant by abetting an offence. According to it, a person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence if committed by a person capable by law of committing an offence. What is abetted is thus in this section either an "offence" or an "act". Abetment as an offence consists of abetting some offence made punishable by the Code. Explanation 2 states that to constitute the offence of abetment it is not necessary that the act abetted should be committed. Explanation 4 declares that the abetment of an offence being an offence, the abetment of such abetment is also an offence. Sections 109 and 116 prescribe the punishment for the offence described in section 108 in two cases: (i) when the act abetted is committed in consequence of the abetment, and (ii) when the offence abetted is punishable with imprisonment and is not committed. The words "when the abetment of an offence is an offence" do not mean when an abetment of an offence is actually committed, but mean when the abetment of an offence is by definition or description an offence under the Code; that is, when the abetment of an offence is punishable under section 109 or section 116 or some other provision of the Code, then the abetment of such abetment is also an offence. In an early case, *Empress* v. *Troy*-

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1. (1926) I.L.R. 4 Rang. 506.
2. (1926) I.L.R. 50 Bom. 250.
3. A.I.R. 1934 Bom. 212.
4. (1904) 6 Bom.L.R. 861.
5. A.I.R. 1934 All. 693 (2).

lukko Nath Chowdhry[1], *A* had sought the aid of *B* with the intention of committing theft of property belonging to *B*'s master. *B* with the consent of his master and with a view to procure *A*'s punishment aided *A* in carrying out the object. *A* having instigated *B* to abet him to do that which if committed would have been an offence was held guilty of having abetted in the abetment of an offence, though the offence of theft may not have been committed by reason of the owner's consent. In *Srilal Chamaria* v. *Emperor*[2], one *S* had instigated *K*, a bench-clerk of a magistrate, to instigate the latter to accept a bribe for acquitting an accused in a case pending before him and granting sanction against the complainant in the case. *K* received such gratification as a police spy and intending to get *S* arrested but did not instigate the magistrate to accept the bribe. It was held that *S* was guilty of abetment of abetment of bribery under section 161 read with section 116. The ruling in the case under notice, that the abetment of an offence is an offence though the second abetment proves ineffective, is thus in accord with the precedents on the matter.

In the matter of Venkateswarlu, (1950) 2 M.L.J. 207.

A point of great interest concerning the privileges of a member of the State Legislature under the Constitution of India fell to be considered *inter alia* in this case. Under Article 105 of the Constitution of India, the powers and privileges of each House of Parliament and of the members thereof shall be such as may from time to time be defined by Parliament by law and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members at the commencement of the Indian Constitution. A similar provision is made by Article 194 in regard to the powers and privileges of the State Legislature and their members. Thus broadly speaking the privileges of the members of the State Legislature shall, in the absence of any definition by the concerned Legislature by law passed in that behalf, be the same as those available to the members of the House of Commons in England at the commencement of the Indian Constitution. The Legislature in Madras has not so far by law defined or laid down anything in regard to the powers and privileges of its members. Examining the privileges of members of Parliament in England, it is apparent that a member of Parliament is immune from arrest for a certain number of days before and after each session. The object of the privilege is to ensure the safe arrival of the members and their regular attendance at the scene of their duties. The actual number of days before and after each session when the privilege was available fell to be settled only in course of time. Apropos of this, it is stated in Bacon's Abridgement: "It seems in good measure unsettled even at this day. It is indeed argued in most books, that members of Parliament have privilege *eundo, morando, et redeundo*: and that they are entitled to privilege as well after a dissolution as a prorogation of Parliament. By two orders of the House of Lords, one dated the 28th of May, 1624, the other the 26th January, 1628, it is declared that their privilege commences from the teste of their writ of summons to Parliament, and that upon every session and prorogation their privilege is for 20 days before and 20 days after each session, which one of the orders says is time enough for them to come from all parts of the realm, and to return: but the Commons never assented to this, for they claim 40 days before and after each session"[3]. In Balckstone's Commentaries, it is said that the privilege of the Commoner from arrest is 40 days after every prorogation and 40 days before the next appointed meeting.[4] In *Goudy* v. *Duncombe*[5], Pollock, C.B., held that the privilege from arrest exists for 40 days before and for 40 days after a meeting of Parliament and that the rule is the same in the case of a dissolution as in the case of a prorogation. Whether the rule was originally only for a 'convenient term' or for a 'time certain', the period of 40 days had been in vogue for more than two centuries. The learned Chief Baron remarked: "Such

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1. (1878) I.L.R. 4 Cal. 366.
2. (1918) I.L.R. 46 Cal. 607.
3. Tit. "Privilege", c. 4.
4. Vol. 1, p. 165.
5. (1847) 1 Exch. 430: 154 E.R. 183.

has been the usage—the universally prevailing opinion on the subject; and such we think is the law". In an earlier case, *Holiday et Al* v. *Col. Pitt*[1], Parliament had been prorogued on 16th April; on 17th proclamation was ordered to dissolve it; on 18th April the Proclamation was published; on 20th April a member of Parliament was arrested. It was held that the member was entitled to privilege *redundo* for a convenient time and that the member had been arrested within that time. The period of privilege, here stated as a "convenient time" reflects really the earlier position in the matter. The decision in In re *Anglo-French Co-operative Society*[2] is instructive in that it states the "tradition" as to the actual period available and also points out that the privilege applies also to a member of an expiring Parliament who is not a member of the new Parliament. In that case on 24th February, 1880, at the instance of the liquidator of the above Society, the Court had directed Mr. Fortescue Harrison, M.P., within 4 days to deliver up on oath all moneys, documents, property etc., of the Society which had come into his possession since the winding up. On 24th March, 1880, Parliament was first prorogued and later in the day dissolved. The new Parliament had been ordered to meet on 29th April, 1880. On 24th March, a motion taken to commit Mr. Harrison for contempt was refused, and on 6th April a renewed notice of motion was made. Mr. Harrison was not a candidate for any constituency and was on that day no longer a member of Parliament. It was held by Hall, V.C., that there has been a tradition that 40 days is the time to be allowed both before and after each session and that the privilege will be available to one who was a member of the old but is not a member of the new Parliament. The immunity from arrest is, however, not available against the consequences of treason, felony or breach of the peace. Freedom from arrest does not exist in the sphere of criminal process.[3] Applying these principles, it was held in the case under review that member of the Madras Legislature cannot have immunity from arrest in the case of a preventive detention order and that the detention therefore did not constitute a breach of privilege.

MURUGESA MUDALIAR *v.* GOPALAKRISHNA MUDALIAR, (1950) 2 M.L.J. 262.

The term 'scribe' means 'writer' or 'amanuensis'. Whether the signature of a scribe can be regarded as amounting to attestation of a document has not been easy to answer. The meaning of the word 'attest' has been considered in a number of English cases. In *Ellis* v. *Smith*[4], it was pointed out that attestation identifies something, that it carries a character and that the attesting witness must not merely have seen the execution but also subscribed his name as having seen the execution. In *Bryan* v. *White*[5], it was held that 'attest' means the persons shall be present and see what passes and shall when required bear witness to the facts. The same view is found in *Roberts* v. *Phillips*[6]. In *Burdett* v. *Spilsbury*[7], the Lord Chancellor observed: "The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness". Turning to the decisions in this country, in *Muniappa Chettiar* v. *Vellachamy Mannadi*[8], Abdur Rahim, J., remarked: "Attestation does not consist merely in seeing the execution of a document. It requires a further act, that is, subscribing the name of the witness on the document as having seen the execution". The decisions would seem to require that for a person to be regarded as an attestor, he should have in the first place seen the execution and secondly put his signature as a witness to such execution. In *Badri Prasad* v. *Abdul Karim*[9], the scribe had signed the document *before* it was executed, and naturally, he could not be regarded as an attestor, apart from any other consideration. If, however, the scribe had made the endorsement *after* the document was executed and attested, it was felt, it would be some evidence in favour

1. 2 Strange 986 : 93 E.R. 985.
2. (1880) 14 Ch. D. 533.
3. May's Parliamentary Practice, 14th edn., p. 68.
4. (1754) 1 Ves. Jr. 11 : 30 E.R. 205.
5. (1850) 2 Rob. 315, 317.
6. (1855) 4 E. & B. 450.
7. (1843) 10 Cl. & F. 340 : 8 E.R. 772.
8. (1918) 49 I.C. 278.
9. (1913) I.L.R. 35 All. 254.

of regarding him as an attesting witness; *Ayyasami Iyengar* v. *Kylasam Pillai*[1], *Veerappudayan* v. *Muthukaruppa Thevan*[2]. In *Ranu* v. *Laxman*[3], the Bombay High Court observed that the time and place of the scribe's endorsement may show that he did not witness the execution. The matter was considered fully in *Paramasiva Udayan* v. *Krishna Padayachi*[4]. There a mortgage had been attested by two witnesses and signed by the scribe as the writer thereof. One of the witnesses was dead. The plaintiff did not examine the other. The writer of the document was examined and he deposed to seeing the document executed. The question was if such proof would suffice. In the course of his judgment, Seshagiri Ayyar, J., observed: "It would greatly depend upon the facts of each case whether a scribe is also an attesting witness . . . . In this country, less attention should be paid to the name by which a person chooses to style himself than to the character he fills. It will be a question in each case whether a scribe was intended to witness the execution of a document". On the evidence before them the learned Judges were satisfied that the scribe in the particular case could be regarded as an attesting witness and the proof was sufficient. The Privy Council had the question raised before the Board in *Sarkar Barnard and Co.* v. *Alak Manjari Kuari*[5]. There a mortgage had been executed by two women. Their husband had signed the document. In the body of the document it was stated that it was executed by the women with the consent and permission of their husband. Only one person had signed the mortgage deed as witness. On the question whether the husband's signature could be regarded as amounting to attestation, the High Court held that the husband had not purported to sign as attesting witness and that a person who signs only as signifying his approval to the transaction is just like a scribe who signs after seeing the execution of the document by the executants and that under section 59 of the Transfer of Property Act the mortgage must be deemed not to have been properly attested. On appeal, the Privy Council disposed of the matter summarily, in view of the finding that the husband did not intend to sign as an attestor and there was no examination of the High Court's view that the signature of a scribe may not amount to attestation of execution. In the instant case, it was argued that the view propounded by Seshagiri Ayyar, J., in *Paramasiva Udayan's case*[4] stands overruled by the decision of the Privy Council in *Sarkar Barnard and Co.'s case*[5]. The learned Judge rejected the argument on the ground that there was nothing to support the contention in the judgment of the Privy Council which was rendered summarily and without discussion of the merits and without any advertence to the question whether a scribe could under any circumstances be regarded as an attesting witness. There is much to be said for the view taken by Seshagiri Ayyar, J. If in fact the scribe has witnessed the execution and then proceeded to affix his signature, the description of himself as scribe is at the worst only an incomplete description. The fact that he had not described himself also as a witness cannot militate against his showing that he was something more than a mere scribe. It is the character he fills and not the name by which he styles himself that is important. There is nothing in law to prevent the scribe from performing a dual role. He may be an attesting witness and at the same time the writer. Only the fact that he was also an attesting witness will have to be properly established.

RAGHPAL MAHRAJ v. BHAGWANDAS DARUKA, (1950) 2 M.L.J. 350 (S.C.).

If one may, with respect, say so, the above is a helpful decision on the question whether a memorandum delivered after a deposit of title-deeds as security for a loan is compulsorily registrable, for being admissible in evidence to prove the charge. In *Kedarnath Dutt* v. *Shamloll Khettry*[6], Couch, C.J., observed: "The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing. And the reason is that the writing

1. (1915) 26 I.C. 409.
2. (1913) 24 M.L.J. 534.
3. (1909) I.L.R. 33 Bom. 44.
4. (1917) I.L.R. 41 Mad. 535.
5. A.I.R. 1925 P.C. 89.
6. (1873) 11 Ben.L.R. (O.C.J.) 405.

is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered as the only repository and appropriate evidence of their agreement it would be the instrument by which the equitable mortgage was created and would come within section 17 of the Registration Act." This statement was approved by Lord Carson in *Subramonian* v. *Lutchman*[1], and he stated the criterion to be: 'Did the document constitute the bargain between the parties or was it merely the record of an already completed transaction?'". In that case, along with the deposit of title-deeds there was a memo signed and delivered to the creditor which stated: "We hand you herewith title-deeds relating to (specified property) . . . this please hold as security against advances made to us." On the facts of the case, the Privy Council concluded: "Their Lordships have no doubt . . . . . that the memorandum in question was the bargain between the parties and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected." In *Obla Sundarachariar* v. *Narayana Ayyar*[2], Lord Tomlin pointed out that where the memorandum considered *in vacuo* is only a record of the particulars of the documents which it states have been delivered as security in pursuance of a prior agreement and does not state what were the terms of the agreement or indicate the nature of the matter for which the deeds were deposited as security, it remains a list of the documents deposited and no more, and is not a document purporting or operating to create or declare any right, title or interest in the property requiring registration under section 17 of the Registration Act. Lord Tomlin concluded: "No such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties." It may be noted that though the memo may be handed over to the creditor along with the title-deeds it may not yet be registrable. The time factor is not decisive. In *Hari Sankar Pal* v. *Kedar Nath Saha*[3], the memorandum was delivered at a later date after the title-deeds were handed over and yet it was held that registration was necessary. The mortgagee had insisted on execution by the mortgagor of a memorandum of agreement "evidencing the said deposit and embodying the terms and conditions of the loan." In fact the title deeds were deposited accompanied by a memorandum when part of the advance arranged for was paid, but some days later when the balance was given another memorandum was delivered in supersession of the earlier one and this stated the essential terms of the transaction. Two points emerge (*i*) the test to determine whether registration is necessary is to see whether the document constituted the bargain between the parties or was only a record of an already completed transaction; (*ii*) The time when the memorandum was given, whether contemporaneously with the deposit or later, is not relevant. In the instant case, the memoradum which was prepared subsequent to the deposit stated: "We write to put on record that to secure the repayment of money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due . . . . . we have this day deposited with you the following title-deeds . . . . . with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions." It was held by the Supreme Court applying the above principles that the memorandum did not require registration.

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1. (1920) 44 M.L.J. 602 : L.R. 50 I.A. 77 : I.L.R. 54 Mad. 257 (P.C.) : I.L.R. 50 Cal. 338 (P.C.).
2. (1931) 60 M.L.J. 506 : L.R. 58 I.A. 68 : I.L.R. 54 Mad. 257 (P.C.).
3. (1939) 2 M.L.J. 592 : L.R. 66 I.A. 184 : I.L.R. (1939) 2 Cal. 843 (P.C.).

NOTES OF INDIAN CASES.

MANEKLAL MANSUKHBHAI *v.* HORMUSJI JAMSHEDJI GINWALLA AND SONS, (1950) 2 M.L.J. 344 (S.C.).

It was held in this case that an agreement of lease creating a present demise of property but not registered is admissible under section 49 of the Registration Act as evidence of part-performance and that a formal lease is not necessary to attract the application of section 53-A of the Transfer of Property Act. Section 27-A of the Specific Relief Act shows that in the case of a lease the equity of part-performance is an active equity as in English law. But the section applies only to contracts executed after first April, 1930. The defence of part-performance under section 53-A of the Transfer of Property Act will, however, be available to a person who has an agreement of lease in his favour though no lease has been executed and registered. All that would be needed are firstly a contract in writing duly signed in favour of the person setting up the defence and secondly some action on his part in part-performance of that contract. He can then maintain his possession. The instant decision elucidates these points.

MOHAMMAD ISMAIL MARAGAIR *v.* WAZIR BI BI SAHEBA, (1950) 2 M.L.J. 385.

The range and sweep of the provision in section 132 (1) of the Code of Civil Procedure have often been the subject of consideration by Courts. The section states: "Women who, according to the custom and manners of the country ought not to be compelled to appear in public shall be exempt from personal appearance in Court." Various questions concerning the interpretation of these words suggest themselves: (i) what precisely is meant by 'custom and manners of the country'? (ii) is the word 'appearance' to be taken as synonymous with 'attendance'? (iii) is the term 'Court' confined to the room in Court where the Court sits in public or does it include any part whatsoever of the Court building? One thing is clear. The custom and manners of the country cannot be the habits of any particular lady. The question still remains whether the phrase would allow consideration of the customs and manners of a family or a small community. In *Salma Bi* v. *Mohammad Ebrahim Saheb*[1], it was stated by Mack, J.: "As I read section 132 (1) it is not the custom and manners or habits of a particular individual lady which has to be taken into consideration or the customs and manners of a family or a small community but the customs and manners of the country as a whole." In a country so vast as India and with so composite a population as it has, it would be difficult to speak of the custom and manners of the country as a whole. In fact, unlike in England, in this country, the validity of family customs has been recognised in many contexts. Such being the case, it would seem that the phrase 'custom and manners of the country' will take in the custom and manners of a sect or community or even of a family. The instant decision recognises the propriety of the conclusion. It seems to be a logical corollary therefrom that in judging whether a woman is exempt from personal appearance in Court, it is not so much her habits but how her community will regard it that should be considered. In *Mohesh Chunder Addy* v. *Manick Lall Addy*[2], Mr. Justice Stanley ordered the issue of a commission even though it had been shown that the lady in question had on a previous occasion appeared in Court and was examined seated inside a palanquin, on the ground that the community to which she belonged observed purda. Likewise in *Chematkar Mohiney Debee* v. *Mohesh Chunder Bose*[3], Trevelyan, J., observed that the Court should be exceedingly careful before it forced into the public gaze a woman, even though she might have gone outside the purda once either by way of experiment or otherwise. In *Balakeshwari Debi* v. *Jnanananda Banerjee*[4], Mookerjee and Welmsley, JJ., observed apropos of this question: "No doubt a pardanashin lady may completely alter her mode of life and cease to be included in the statutory description of women, who, according to the customs and manners of the country ought not to be compelled to appear in public. When

1. (1949) 2 M.L.J. 517.
2. (1899) I.L.R. 26 Cal. 650.
3. (1899) I.L.R. 26 Cal. 651-n.
4. (1917) I.L.R. 45 Cal. 697.

this transformation has taken place, she can no longer claim as of right, the statutory exemption formulated in section 132. But, if she is, in fact, a pardanashin lady, she is not deprived of the statutory protection, merely because she may have previously appeared in public." In *Solomon* v. *Jyotsna Ghosal*[1], the woman in question was a Hindu lady of good position in society who had definitely abandoned the protection of the purda. It was argued that though the lady may appear in public there was great prejudice against her appearing in the witness-box in Court and that the lady herself was unwilling to appear in Court to give evidence. Greaves, J., said on those facts: "It is suggested that section 132 applies exclusively to pardanashin and quasi-pardanashin ladies and that it was designed for persons who observed the purda system . . . . I do not think that the lady, who, I am satisfied on the evidence, has abandoned entirely the protection of the purda, and who upon the evidence before me, I cannot see has any intention of resuming it, ought to be comepelled having regard to the feelings of her class, to appear in the witness-box, and I am not prepared to force her to do so, because, I think, that the Indian point of view, which I think should be respected, would be that although the lady has abandoned the purda for the purposes to which I have referred, it would be something in the nature of an outrage if I were to compel her, having regard to her social position, to appear in the witness-box to give evidence in Court . . . . . I think section 132 is wide enough to cover her case." The decisions thus seem to hold that for purposes of section 132 the habits of the particular lady cannot be taken into consideration; but, the customs and manners of a family or a small community may merit consideration; that the relevant approach will be to see whether by reason of the lady being compelled to appear in Court the feelings of her community would be offended; if however a pardanashin lady has completely altered her mode of life and ceased to be included in the statutory description of women who by reason of the customs and manners of her country ought not to be compelled to appear in public the position will be different; and, it is not correct to say that section 132 is designed only for persons who observe the purda system.

As to the meaning of the word "appearance," it has been held, practically unanimously, that it is synonymous with "attendance". One or two decisions have sounded a different note. Thus in *Bilasroy Serowgee* In re[2], Lort-Williams, J., remarked: "I am of opinion that the correct meaning of section 132 (1) of the Civil Procedure Code is that a lady who, according to the customs and manners of the country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court, that is, from being exposed to the public gaze—such a person is exempt not from attendance in Court but from appearance in Court. I think 'appearance' means that she shall not be compelled to come forth into view or become visible to the public gaze." In *Mariam Bai* v. *Abdul Hamid Suleman*[3], Blagden, J., felt inclined towards the same view if he was not compelled by authority to adopt a different conclusion. The view of Lort-Williams, J., has, however not been accepted. In *Sunder Devi* v. *Dattatraya Narhar*[4], Rachhpal Singh, J., observed: "If a pardanashin lady observing strict parda is ordered to attend the Court it means that she is compelled to appear in public. Her face may be covered or she may be wearing a burka, but all the same she is compelled to appear in public if she is ordered to attend the Court. This is against the spirit of section 132 of the Code of Civil Procedure. In families in which ladies observe strict purda, it is considered most objectionable for them to appear in public even with their faces covered. I am of opinion that the words 'personal appearance' used in section 132 mean 'personal attendance." In *Kissen Lal Kankoria* v. *Purshottam Das Halwasiya*[5], Edgley, J., said: "It will be seen that Lort-Williams, J., draws a distinction between personal appearance in Court and attendance in Court, but in my view, the expressions really mean the same thing. In Order 26, rule 1 of the Code reference is made to a person who is exempted under this code

1. (1917) I.L.R. 45 Cal. 492.
2. (1929) I.L.R. 56 Cal. 865.
3. A.I.R. 1946 Bom. 340.
4. (1933) I.L.R. 55 All. 666, 669.
5. I.L.R. (1941) 2 Cal. 155.

from attending the Court. This portion of the rule can only refer to the exemption granted by sections 132 and 133 of the Code. It appears from the language which has been used by the Legislature that women who according to the customs and manners of the country ought not to be compelled to appear in public, have as regards personal appearance been placed in the same category as persons who are exempted from personal appearance by reason of their rank under section 133. It cannot be contended that persons who fall within the latter category although they need not appear in Court may be compelled to appear in Court." In the decision under notice, Rajamannar, C.J., takes the view that whatever difference there might be etymologically, the Court does not appear to make any distinction in practice between "appearance in Court" and "attendance in Court."

In regard to the meaning of the word "Court," in *Mariam Bai* v. *Abdul Hamed Suleman*[1], Blagden, J.'s inclination was to hold that it refers to the room in Court where the Court sits in public. The learned Judge also said: "The question does not seem to have before been considered whether the expression "in Court," means in Court room, *i.e.*, the room in the Court building where the Court sits in public or whether it includes any part of the Court building . . . . . However that may be I do not think that a woman who is conveyed to the Court building in some suitably curtained vehicle and then escorted to a private room in that building, suitable and completely veiled in a burka or some other garment and is examined in a private room could be said to be making a personal appearance in Court." Blagden, J.'s reasoning is that in such a case she will be to the Judge not an observable form but only an observable voice. The view of Blagden, J., is accepted by Rajamannar, C.J., in the instant case, where the lady was prepared to depose before a commission. He said: "On principle I see no difference between the house of the opponent's counsel and the chambers of the trial Judge. In both cases the lady has to leave her house and go to another place. The general public can be shut out from the Judge's chambers as effectively as, if not more than from the residence of the opposing counsel. This would be equally so even if the examination takes place in the Court room itself, but after excluding the general public from it altogether. During the examination, except the trial Judge and officers of Court and counsel and parties, others would not be present. There is virtually no difference between such an examination and an examination on commission. But such a course would have the great advantage of enabling the trial Judge to listen to the deposition. I venture to think that such a course would not infringe the provision of section 132 (1) of the Code." With all respect, it may be stated that if what section 132 provides for is not merely exemption from appearance but also from attendance in Court, and if the word Court means not merely the room in which the Court sits in public but every part of the Court building, then surely the examination in any part of the Court premises even if it be in camera would be an infringement of the statutory protection afforded by the section.

The instant decision is also noteworthy for its refusal to take judicial notice unlike in *Salma Bi's case*[2] of a complete change in the customs and manners of the Muslim community in the State of Madras as regards the custom of gosha. That a Court is bound to take judicial notice of changes in certain circumstances is indisputable. The question will still remain as to the circumstances under which such notice should be taken.

PADMANABHA KAKKOTHAYA *v.* KESHAVA DERINJITHAYA, (1950) 2 M.L.J. 438.

This case deals with an interesting question in the domain of the law of contracts. It holds that if one of the persons liable to contribute did not or could not pay his proportion, that amount has to be divided among other contributors only in the proportion of the benefit which each of them has received at the time of the original contract. In *Arunachalam Servai* v. *Nottam Beer Vavu Rowther*[3], it was stated: "again if the judgment-debtors *inter se* should be found to have enjoyed

1. A.I.R. 1946 Bom. 340.
2. (1949) 2 M.L.J. 517.
3. A.I.R. 1928 Mad. 588.

the original consideration for the debit which became merged in the decree in unequal proportions, it follows that it is such proportion that will govern, as between them their mutual obligations under the decree." This view was accepted by the Patna High Court in *Mt. Jagpati Kuer* v. *Sukhdeo Prasad*[1]. These were, however cases of division of the original debt amount between the contributories. The decisions did not deal with cases where the division related to the contributory amount of the defaulting contributor as among the rest. Section 43 of the Contract Act provides in para 3 that if any one of two or more joint promissors makes default in contribution, the remaining joint promisors must bear the loss arising from such default in equal shares. Here again the paragraph does not concern itself with cases where a contributory has defaulted and the others have had to pay that sum, though the benefits received by them under the original contract had been in differing proportions. The position so far as English law is concerned seems to be fairly well settled and clear. In *Dering* v. *Earl of Winchelsee*[2], it was pointed out that the doctrine of contribution is the result of general equity on the ground of equality of burden and benefit. In *Lowe & Sons* v. *Dixon & Sons*[3], Lopes, J., observed: "At Law, if several persons have to contribute a certain sum, the share which each has to pay is the total amount divided by the number of contributors; and no allowance is made in respect of the inability of some of them to pay their shares. But in equity those who can pay must not only contribute their own shares but they must also make good the shares of all those who are unable to furnish their own contribution. Inasmuch therefore as the rules of equity prevail (*see* section 25 (11) of the Judicature Act, 1873, the defendants must make good each one half of that which Lund, Beveridge & Co., are unable to pay." A full statement of the law covering a situation like that presented in the instant case is made in *Gardner* v. *Brooks*[4], where O'Brien, C.J., observed: "The right comes in equity originally and absolutely by the payment in discharge of a common burden and has no existence whatever, inchoate or incomplete, till the payment is made. It is not therefore affected by what affects the contract ...... The principle came into England from the civil law where it pursues exactly the same consequences and distinctions that are found in equity all based on community of burthen and benefit from payment and more from agreement." It is thus clear that if there is an agreement among the parties in the matter, the agreement rules. In the absence of one, the principle of community of burden and benefit of payment governs. These are rules of equity founded in conscience. The position so set out has found approval in *Abraham Servai* v. *Raphial Muthirian*[5]. Following these leads, the learned Judges in the case under review have held that the Indian Contract Act has not provided for the contingency where the contributories have shared unequally the benefit under the original contract and later on the question arises of sharing the liability created by one of the contributories defaulting to pay what he had to pay, and that it must therefore be regarded as a *casus omissus*.

KUMARASWAMI CHETTIAR *v.* CHINNATHAMBI CHETTIAR, (1950) 2 M.L.J. 453.

This decision cuts interesting ground. It decides *inter alia* that the beneficial ownership which the partners of an illegal partnership may have in the properties of the partnership cannot form the basis of an action for partition or other similar relief. Under section 4 of the Companies Act, no company, association or partnership consisting of more than 20 persons shall be formed for carrying on any business for the acquisition of gain unless it is registered as a company. Absence of registration renders such a concern unlawful. Despite non-registration, the association can be beneficial owner of property. This was recognised in *The Queen* v. *Tankard*[6] where Lord Coleridge, C.J., laid down: "It is true that they have no legal existence as a company, association, or co-partnership; but they are none the less beneficial owners of property . . . . . It does not follow that, because the club

1. (1941) I.L.R. 20 Pat. 811.
2. (1787) 1 Cox. Eq. Cases 318: 29 E.R. 1184; 2 Bos. & Pul. 270: 126 E.R. 1276.
3. (1885) 16 Q.B.D. 455, 458.
4. (1897) 2 Ir. Rep. 6, 12.
5. (1914) 27 M.L.J. 746: I.L.R. 39 Mad. 288.
6. (1894) 1 Q.B. 548.

had no legal existence as a company, association or copartnership, the members had no legal existence as beneficial owners of property. It is untrue to say that they are not beneficial owners in fact. . . . . It would be a very strong thing to hold that an association not expressly sanctioned by law, yet not criminal, is incapable of holding any property at all." In *R.* v. *Steiner*[1], it was held that a person could be convicted of embezzling or stealing the property of such an association. It was at the same time recognised that such capacity for beneficial ownership notwithstanding, the association or its members cannot maintain any action in respect of any contract made by that body. In *Sykes* v. *Beadon*[2], Jessel, M.R., stated the principle to be : "It is no part of the duty of a Court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract." A suit for accounts or dissolution will not lie at the instance of any of the members. In In re *Padstow Total Loss and Collision Assurance Association*[3], Jessel, M.R., observed : "If the case falls within the terms of the 4th section the formation of the company is prohibited and it is impossible to suppose that the Legislature could have intended that a company which is prohibited from being formed under the 4th section (of the Act of 1862) can be wound up under the 199th with all the consequences that follow from it." Likewise a suit for the recovery of money lent by the association is not maintainable, *Jennings* v. *Hammond*[4]. Nor will an endorsee from it of a promissory note in its favour be competent to sue for the recovery of the amount due from the maker, *Shaw* v. *Benson*[5]. A suit by a member of the association for recovery of the subscription paid by him will however be competent. In *Greenberg* v. *Cooperstein*[6] an association with four branches was found to obtain subscriptions from members of each branch and to lend to members out of the fund so formed money on interest. Each fund with its accretions of interest was divided up periodically among the members rateably at a period of the year which differed in each branch. The association and its branches consisted of more than 20 persons and had not been registered under any statute. Disputes having arisen, a resolution for dissolution was passed. Some of the members sued the Secretary and the Treasurer claiming administration of the assets, an account of the subscription received and its application, payment of the amounts due to them and other reliefs. In the course of his judgment Tomlin, J., holding that notwithstanding non-registration the Court was not debarred from affording relief to the members asking for the return of the money paid into the hands of agents for application for an illegal purpose, observed : "I do not myself believe that the law is so powerless that when money is in the hands of persons who have received it for application for an illegal purpose it cannot protect the contributories or enable them to recover it, before it has been applied for this illegal purpose." The learned Judge held the situation to be different from the cases where it had been held that an illegal association could not recover money lent by it. In *Butt* v. *Wenteaux*[7], Page Wood, V.C., had stated : "It would be very difficult to persuade me that the members of such an association although they could not do more, or stir a step further without registration were not sufficiently qualified to be called a company, to have back their money . . . and the land and other things acquired with the money, and to have an account from the promoters, whose duty it was to register, on the footing as between them and the promoters of its being in truth a company, and upon the principle that a man could not aver any wrong or omission of his own as an answer to a bill seeking such relief." But in neither case was it clear as to what relief would have been actually given on the account being taken. In India, in *U Sein Po* v. *U. Phyu*[8], it was held that though the members of the association could not sue for an account of the dealings and transactions entered into by it and of the profits, they had a right to sue for a return of their subscriptions and if these had been converted into land or other things they can be reconverted into money to meet the debts and liabilities of the association and then for repayment of the

1. 39 L.J. (M.C.) 54.
2. (1879) 11 Ch. D. 170, 196.
3. (1882) 20 Ch. D. 137.
4. (1882) 9 Q.B.D 225.
5. (1883) 11 Q.B.D. 568.
6. (1926) 1 Ch. 657.
7. (1854) 1 K. & J. 97 : 69 E.R. 385.
8. (1929) I.L.R. 7 Rang. 540.

subscribers. Where however the relief asked is not a return of the subscriptions simpliciter, but something different, as for instance, for a refund of the plaintiff's subscription out of the proceeds by an auction sale of the assets of the association or in the alternative for a division of such assets and award to the plaintiff of a certain share therein or in their sale proceeds, in *Mewa Ram* v. *Ram Gopal*[1], it was held that the relief of partition was one which involved the realisation of the assets, payment of debts, sale of property and distribution of the surplus among members and was in truth and substance what would be done in a suit for dissolution or winding up and therefore could not be permitted. In the instant case, there was no prayer for the refund of subscriptions and again the partnership had run for several years and the moneys had been used for furtherance of its objects. In those circumstances, the Court took the view that relief by way of partition of the assets could not be granted.

DEVARAJA AIYAR *v.* SRINIVASAN, (1950) 2 M.L.J. 484.

This is a copy-book decision and re-affirms the meaning of the phrase "voluntarily resides" in section 20 (*b*) of the Civil Procedure Code as laid down by the earlier decisions in Madras. The ordinary residence of a person is a question of fact, and of degree in each case. This was pointed out in In re *Norris*[2], where it was held that a person who had taken up a room in a hotel which he paid for and from which he addressed letters and where he was constantly seen, ordinarily resided there within the meaning of the Bankruptcy Act of 1883, though his wife and family resided at Brussels and the person himself was going backwards and forwards to Brussels and other places. Another angle relating to the matter was brought out by James, L.J., in Ex parte *Bruell: In re Bowie*[3], when he observed that the word 'resides' has no definite technical meaning but should be construed in accordance with the object and intent of the Act in which it occurs. In *Nusserwanjee Wadia* v. *Eleonora Wadia*[4], it was no doubt stated that residence conferring jurisdiction within the meaning of section 2 of the Indian Divorce Act should be *bona fide* and not casual or as a traveller. The decision was however one with reference to the particular context only. In the presidency of Madras, it had been laid down as early as *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*[5], that temporary residence would by itself be a ground of jurisdiction and that the term 'residence' does not require that it should be permanent residence. It is noteworthy that the decision in the case was affirmed on appeal by the Judicial Committee in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*[6], without exception being taken to the exposition of the law by the High Court as to jurisdiction arising by reason of temporary residence even. The instant case, treats the question as being finally decided so far at any rate as this Province is concerned.

BELLI GOWDER *v.* JOGHI GOWDER, (1950) 2 M.L.J. 639.

Under the former Arbitration Act of 1899, it was held, generally, that it was not a comprehensive Act, that it dealt with a particular class of arbitration only, namely, where there was a written agreement to submit differences to arbitration in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit whether with leave or otherwise could have been instituted in a Presidency Town, and that an award upon an oral submission to arbitration of a matter to which the Act applied will not be invalid, *Ponnamma* v. *Kotamma*[7], *Ramautar Sah* v. *Lingat Singh*[8], *Mathurdas* v. *Maganlal*[9]. Mr. Justice Beaman had taken a contrary view in *Rukhan Bai* v. *Adamji*[10], but this view was repudiated in the last of the decisions cited *supra*. The scope and extent of the Arbitration Act of 1940 have come for similar examination. In *Gauri Singh* v. *Ramlochan Singh*[11],

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1. (1928) I.L.R. 48 All. 735.
2. 4 T.L.R. 452.
3. (1880) L.R. 16 Ch. D. 484, 487.
4. (1919) I.L.R. 38 Bom. 125.
5. (1905) I.L.R. 29 Mad. 239: 16 M.L.J. 238.
6. (1911) 21 M.L.J. 669 : L.R. 38 I.A. 1291 : I.L.R. 34 Mad. 257 (P.C.).
7. (1932) 63 M.L.J. 610 : I.L.R. 56 Mad. 85.
8. A.I.R. 1931 Pat. 92.
9. (1933) I.L.R. 58 Bom. 369.
10. (1908) I.L.R. 33 Bom. 69.
11. A.I.R. 1948 Pat. 430.

one of the contentions was that a suit for enorcing an award made upon an oral reference was outside the Arbitration Act, 1940. In holding that, such an award had no validity and could not be enforced, Meredith, J., said: "I confess that in tackling this question and trying to ascertain the intention of the framers of the Act, I have at times felt inclined to throw up my hands in despair and exclaim 'God alone knows what they did mean.' We Judges can only do our best. It may be regarded as settled that, so far as schedule 2, Civil Procedure Code and the Arbitration Act of 1899 were concerned an award based upon an oral submission or reference to arbitration was not touched, but was perfectly legal and valid, and the award could be enforced by suit, though not by the special procedure under the provisions of the Civil Procedure Code or the 1899 Act. That Act was regarded as not exhaustive even in the limited areas where it was applicable . . . . . has the position been altered by the Act of 1940? In my opinion it has. The Act of 1899 was described as 'An Act to amend the law relating to arbitration' but the Act of 1940 is headed 'An Act to consolidate and amend the law relating to arbitration' and the preamble says 'whereas it is expedient to consolidate and amend the law relating to arbitration in British India.' It is an Act to consolidate the arbitration law. This suggests that it is intended to be comprehensive and exhaustive. The legislators must have been aware that it had been settled that an award based upon an oral submission cannot be a valid award. It was known therefore, that there were two sorts of valid awards, and that to use the word 'award' without more, would in the circumstances be ambiguous. Yet that is just how the word has been used...... after defining an award ambiguously, the ambiguous word is used in stringent provisions to prevent any procedure with reference to awards other than that provided in the Act." After examining sections 47, 26, 30 and 32 the learned Judge held: "I think I am justified in holding . . . that the Act was intended to be exhaustive of the law and procedure relating to arbitration." The same view has been taken in the present case in regard to the scope of the Act. Viswanatha Sastri, J., observed: "The question whether it was intended merely to make awards on oral submissions unenforceable under the procedure of the Arbitration Act or to make them invalid and unenforceable altogether, would depend to a large extent on whether the Act is exhaustive of the law of arbitration. I am inclined to think that it is. I therefore hold that an award passed on oral submission can neither be filed and made a rule of Court under the Act, nor enforced apart from the Act."

SUBBA REDDY *v.* ANDEMMA, (1950) 2 M.L.J. 650.

That a receiver may be appointed in a *bona fide* litigation of the right of probate is well settled in English law, *Watkins* v. *Brett*[1], *Rendall* v. *Rendall*[2]. In India, in *Nirode Barani Debi* v. *Chamatkarini Dabi*[3], it is pointed out that a probate proceeding is not a suit in which there is property in dispute, as the only question in controversy in such a proceeding is that of representation of the estate of the deceased and the Probate Court is therefore not competent to grant a temporary injunction under Order 39, rule 1, Civil Procedure Code. It was stated that the proper procedure is to apply to the Court for the appointment of an administrator *pendente lite* under the Probate and Administration Act, 1861 (corresponding to section 247 of the Succession Act, 1925) and when such an application is made the Court may grant a temporary injunction either in exercise of its inherent powers or under Order 39, rule 7, Civil Procedure Code. In the goods of *Stanley Austin Cardigan Martin*[4], the proceeding was for the grant of letters of administration. An application for an injunction to restrain certain authorities from making payment of money lying with them and appertaining to the estate of the deceased was made. It was held that the application was not maintainable under Order 39, rule 1, Civil Procedure Code, but that the High Court may under its inherent powers as a Chartered High Court issue it when the ends of justice require. In Madras

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1. (1835) 1 Mylne and Craig 97 : 40 E.R. 313.
2. (1841) 1 Hare 152 : 66 E.R. 986.
3. (1915) 19 Cal.W.N. 205.
4. A.I.R. 1939 Cal. 642.

itself, in *Namagiri Ammal* v. *Subba Rao*[1], pending an appeal from a decree granting probate to the respondent, the appellant applied for an injunction to restrain the respondent from taking possession of properties forming part of the estate, and from collecting certain outstandings. It was held by Rajamannar, J., that *Nirode Barani's case*[2], was distinguishable as one where the application for letters of administration was still pending unlike in the case before him where probate had been granted and again the application was preferred pending an appeal and so it was not permissible to rely on any inherent powers the Court may possess on its original side. In the case under review, it is pointed out that where in probate proceedings there is danger to the assets of the estate being secreted or otherwise dealt with by the parties in possession, to safeguard such estate it would be just and proper to appoint a receiver or administrator *pendente lite*.

THE PROVINCE OF MADRAS *v.* THE DISTRICT BOARD OF TANJORE, (1950) 2 M.L.J. 663.

This is an interesting decision relating to the levy of water cess and, if one may say so, sums up neatly the principles of law applicable to the situation. It is now generally recognised that the extent of the free right of irrigation available to zamindars and inamdars is to be gathered from the decision of the Judicial Committee in *Prasad Row* v. *Secretary of State*[3]. The law is well settled that the permanent settlement sanads and engagements arising out of inam settlements are engagements contemplated by the Irrigation Cess Act of 1865. Also in the matter of considering the effect of such engagements, the same principles ought *prima facie* to apply to the engagements implied in the inam settlement as to the engagements implied in the permanent settlement, *Yahya Ally Saheb* v. *The Secretary of State*[4]. If at the time of the engagement, the inamdar or zamindar was drawing water to his lands from a channel of particular dimensions, the limit or measure of the inamdar's right to water is not the extent of land cultivated as wet at the time of the inam or permanent settlement but is set by the physical conditions such as the size of the channels and the nature and extent of the sluices and weirs, if any, governing the flow of water into such channels, *Secretary of State* v. *Sri Varada Thirtha Swamigal*[5]. Where the zamindar or inamdar not only took the water from the channel but stored it in an irigation tank to facilitate a continuous supply of water, so long as the easement is not enlarged, even if more water is conserved the Government will not be entitled to levy water cess, *Yahya Ali Saheb* v. *The Secretary of State*[4]. An increase in the storage capacity of the tank by raising the bund or deepening the tank will not attract liability to levy of cess, so long as the dimensions of the feeding channel situate within the inam village are not altered, *ibid*. In *Sri Ekambareswaraswami Temple of Sirukarumbur* v. *The Provincial Government of Madras*[6], there was a tank in the inam village which irrigated the lands of the inam village. Water to this tank was served by a channel belonging to Government known as Ammanam Kolakkal which after supplying water to the tank passed on to a village lower down. The inamdars had raised the level of the surplus water of the tank and thereupon the Government imposed a levy of water cess. It was held by Somayya, J., that the levy was not warranted. The learned Judge observed: "the only ground which would justify the Government in levying water cess is that the channel Ammanam Kolakkal was interfered with at its entry into the village or above, and that a larger quantity of water is taken from the channel than what was hitherto flowing into the village." In the case under review water was supplied to an inam village by a channel admittedly situated within the limits of the village, and water for irrigation had been drawn from the channel without any liability to pay water cess from time immemorial. After the construction of the Cauveri Mettur project the flow of water in the channel had become more certain and copious. The Government levied water cess on this ground. It was held that cess, in the circumstances was not leviable.

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1. (1947) 2 M.L.J. 364 : I.L.R. (1948) Mad. 494.
2. A.I.R 1932 Cal. 642.
3. (1917) I.L.R. 40 Mad. 886 : L.R. 44 I.A. 166 : 33 M.L.J. 144 (P.C.).
4. (1927) 53 M.L.J. 769.
5. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. (1942) Mad. 893 (P.C.).
6. (1945) 1 M.L.J. 317.

KRISHNA PILLAI *v.* RANGANATHA PILLAI, (1950) 2 M.L.J. 759.

Order 3, rule 4 of the Civil Procedure Code lays down that the appointment of a pleader to act for any person in any Court shall be in writing signed by such person or by his recognised agent and that every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader as the case may be and filed in Court, or until the client or the pleader dies; or until all proceedings in the suit are ended so far as regards the client. Termination of a pleader's authority can thus take place, apart from a case of death, only by (i) a writing filed in Court to that purpose, and (ii) the Court according leave to so determine authority. A vakalatnama in the usual terms is held to imply necessarily the power to do everything necessary for the proper conduct of the case and if the case had been decided *ex parte* to have that order set aside and the case heard on the merits and a fresh vakalatnama need not be put in, *Raghunath Singh* v. *Raghubir Sahai*[1], *Abdul Aziz* v. *Punjab National Bank*[2], *Jwala Devi* v. *Brigunath Sahai*[3]. In *Bachubai* v. *Ibrahim*[4], Macleod, C.J., observed: "After all, these rules with regard to vakalatnamas are only prescribed in order that, if a party does not appear in person the Court may know that the person appearing on his behalf is competent to appear. It seems to us to be taking an extremely narrow view of the rules with regard to vakalatnamas to say that the effect of the old vakalat had expired as soon as the *ex parte* decree had been passed, and that it would be necessary before a pleader could be heard that he should obtain a fresh one." Where a pleader reports no instructions, the question arises whether the vakalat expires automatically. Reporting no instructions, it is apprehended, will extinguish authority only if the two requirements set out *supra* are satisfied, namely, it should be in writing and the Court should accord leave. In *Manickam Pillai* v. *Mahudum Bathummal*[5], it has been recognised that the statute does not require the writing containing the withdrawal by the pleader of his vakalat to be in any specified form and that no formality is necessary about the leave of the Court required for the withdrawal of the pleader. The decision does not, however, mean, that the writing can be dispensed with or that the leave of the Court to the withdrawal would not be necessary. In that particular case, on the day of the hearing, the plaintiff's vakil asked for adjournment and stated that if it was not granted he had no further instructions to go on with the case. He also took the plaint and endorsed on it "I have no instructions except to apply for an adjournment." In the circumstances, it was held that there was a "withdrawal" of the authority of the vakil. In the instant case, because his clients were not ready, their advocate, through another advocate, reported no instructions. The suit was then decreed *ex parte*. In an application to set aside that *ex parte* decree the advocate tendered the old vakalat and did not file a fresh one. Horwill, J., held that a fresh vakalat should be filed. The learned Judge held that when a vakil reports no instructions it means that he withdraws his vakalat. To equate the reporting of no instructions to the withdrawal of the vakalat may not be justified. It can amount to a withdrawal only if the two requirements mentioned in Order 3, rule 4 are satisfied. An oral report of no instructions will not on the language of the rule have the effect of withdrawal. In *Manickam Pillai's case*[5], it was endorsed on the plaint and that was held to suffice. In the present case there is no advertence to the necesity for writing. If the learned Judge meant that orally reporting no instructions amounts to a withdrawal of the vakalat it is not warranted either by the language of the rule or anything contained in *Manickam Pillai's case*[5].

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1. (1893) I.L.R 15 All. 55.
2. (1929) I.L.R 10 Lah. 570.
3. I.L.R (1944) All. 593.
4. (1922) I.L.R 47 Bom 11.
5. (1924) 47 M.L.J 398: I.L.R 47 Mad. 819 (F.B).

DURAISWAMY NAIDU *v.* MUHAMMAD ABBAS SAHIB, (1950) 2 M.L.J. 778.

This decision holds that a vendor of immoveable property remaining in possession after sale will not be entitled to interest on the unpaid purchase money irrespective of equities in the case. The right of an unpaid vendor generally to interest on the purchase money has been long recognised. As to the date from which interest would run, in *Ratanlal Choonilal Panalal* v. *The Municipal Commissioner of the City of Bombay*[1], the law was stated by Lord Shaw as follows: "The right to interest depends upon the following broad and clear consideration. Unless there be something in the contract of parties which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand the new owner has possession, use and fruits; on the other, the former owner parting with these, has interest on the price. This is sound in principle, and authority fully warrants it." It is also the English law that the date when the vendor renders possession is the date from which interest will run, *Fludoer* v. *Cocker*[2], *Greenock Harbour Trustees* v. *G. & S. W. Railway*[3], *Birch* v. *Joy*[4]. Adverting to the principle stated by Lord Shaw, Macleod, C.J., said in *Pandurang Balaji* v. *Mahadeo Gopal*[5], that "this is a principle of equity, and it is quite independent of the provisions of the Transfer of Property Act." The basis of the principle laid down by the Privy Council was explained to be that the purchaser in possession and enjoying the fruits of the property should not at the same time be enjoying the use of the unpaid price, unless it can be shown that the parties have contracted to that effect. It follows that likewise the seller continuing in possession after the sale cannot at the same time claim interest on the purchase money apart from the equities of the case. The question of interest on unpaid purchase money is now governed in this country by section 55 (4) (*b*) of the Transfer of Property Act. Under that provision interest becomes payable from the date on which possession has been delivered. It is true that the provision as to the date was introduced into the Act by the Amending Act XX of 1929. But even without that express provision, it had been held by the Madras High Court in *Muthia Chetty* v. *Sinna Velliam Chetty*[6], that section 55 (4) (*b*) did not give the vendor an absolute right to interest on the purchase money irrespective of the equities and the circumstances of each case and that the section does not enact that the vendor is entitled to interest in every case. The learned Judges quoted with approval the following passage from Fry[7]: "it is obviously inequitable in the absence of express and distinct stipulation that either party to the contract should at one and the same time enjoy the benefits flowing from the possession of the property and those flowing from possession of the purchase money. The estate and purchase money are things mutually exclusive. 'You cannot' said Knight Bruce, V.C., in a case arising out of the sale of slob lands in Chichester harbour, 'have both money and mud.'" In the case under review, a house in urban area had been sold on 1st October, 1945. Possession was delivered by the vendor to the vendee on 8th November, 1946 and it was found that till then the vendee was in occupation. Interest was claimed on the purchase money from the date of the sale. It was held conformably to the principles set out *supra* that interest can be claimed only from 8th November, 1946.

S. V. S. NIDHI LTD. VELLORE *v.* DAIVASIGAMANI MUDALIAR, (1951) 1 M.L.J. 18.

The question that fell to be decided in this case was one practically bereft of authority. It was, however, a simple one. The question was whether, apart from the holding of shares, any additional qualification can be imposed for a director. Sections 84, 93, 103 and others as well as Regulation 70 of Table A and Regulation 77 of the Indian Companies Act relate to the share qualifications,

1. (1918) 36 M.L.J. 1 : I.L.R. 43 Bom. 181 (P.C).
2. 12 Ves. Jr 25.
3. (1909) Sess. Cases 50.
4. 3 H.L. 565, 590.
5. (1921) I.L.R. 46 Bom 195.
6. (1911) 21 M.L.J. 236 : I.L.R. 35 Mad. 625.
7. Specific Performance, 4th edn., p. 591.

if any, of the directors as required by the Articles. The Act does not throw light on the question whether any additional qualification may be prescribed. In In re *People's Bank, Lahore*[1], on an application under section 153 for the resuscitation of the Bank a contention was raised whether it would be necessary for a director elected by the creditors to hold some shares of the company. In that context it was observed : "The only point on which counsel were not agreed was whether under the law it was necessary for each director who is elected by the creditors to hold some shares in the company . . . . I am of opinion that there is nothing in the Companies Act making it obligatory on a director to hold shares." It is for the articles of association to prescribe the qualifications for the directors. Any qualifications so laid down can be changed only by a special resolution. This point was made clear in *Navnitlal Chabildas* v. *Scindia Steam Navigation Co., Ltd.,*[2] It was there argued that inasmuch as the Indian Companies Act did not require that there should be any qualification for a director the company could provide that the qualification should be the holding of shares of a particular value or any other value as may be determined by a general meeting. Repelling the argument, it was held that the company cannot alter the qualifications of a director as laid down in the articles of association except by a special resolution. In the instant case, the articles of association had provided that each director shall hold not less than 25 shares. Subsequently a special resolution was passed at an extraordinary meeting of the concern providing for the holding of a fixed deposit, as an additional qualification for a director. It was held that there was nothing in the Companies Act which prohibits additional or different qualifications for directorship apart from the holding of shares. It was observed : "The holding of shares . . . . is not a necessary *sine quo non* . . . . Equally it is clear to my mind that the shareholders may well desire to have other qualifications for a person to be a director though it may not be a share qualification. There is nothing unreasonable, for instance, in having a minimum age limit with a view to justify confidence in the mature judgment of the person to be appointed, a literacy qualification or even a technical qualification if the requirement of the company's business should justify the necessity for the same in the opinion of the organisers or promoters or shareholders. Indeed in some cases, it may even be necessary in the interests of security of the State to prohibit a non-national from being in the directorate of a concern of national importance, for instance, one for the manufacture of atom bombs or hydrogen bombs. The presence of an alien in the directorate of such a company promoted by a State would obviously be undesirable. I can find nothing in the Companies Act to preclude a provision for that. In truth the matter is left entirely to the discretion and judgment of the shareholders."

KRISHNAMARAJU *v.* REDDAMMA. (1951) 1 M.L.J. 49.

Article 14 of the Constitution of India assures to every person equality before the law. Article 15 prohibits discrimination by the State *inter alia* on the ground of sex. Article 13 provides that all laws in force in so far as they are inconsistent with or in derogation of the rights mentioned in Part III shall to the extent of the inconsistency be void. The term "laws in force" includes laws passed by a Legislature or other competent authority before the commencement of the Constitution of India. The personal laws of the Hindus by virtue of statutory provisions authorising their applicability to Hindus, as for instance, the Declaratory Act (21 Geo. 3, c. 70, section 17) and other enactments, or by reason of recognition by judicial decisions will clearly fall within the ambit of the term "laws in force" at the commencement of the Constitution. Any question therefore involving rights of women will now have to be examined from that standpoint in regard to the validity of any discrimination found. So far however as transfers *inter vivos* or testamentary

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1. A.I.R. 1933 Lah. 51. 2. A.I.R. 1927 Bom. 609.

dispositions by private individuals are concerned, these provisions have no operation. What passes under the transfer will be a matter of intention. Even there, there are presumptions—*vide* section 8, Transfer of Property Act. In *Venkatappayya* v. *Venkatasubbayya*[1], it was held that in the absence of any evidence that lands set apart for maintenance of a female member of the family were not intended to be resumed on her death, the presumption is that they are resumable. And in *Mangamma* v. *Dorayya*[2], it was held by Pandrang Rao and K. S. Menon, JJ. that in the absence of direct evidence one way or the other there is no presumption as to the quantum of interest which a Hindu female takes in respect of immovable property given to her. It is to be noted that in both the decisions the sex of the party is assumed to carry a certain amount of significance. It is not treated merely as a question of intention arising from the terms of the grant but as a question where the sex of the grantee assumes relevance. This approach was due to what the Judicial Committee thought constituted the ordinary notions and wishes of Hindus in the matter of grants of property to females, *Shamsul* v. *Shewakram*[3]. It seems to be debatable whether in view of the different policy deliberately adopted in legislative enactments like the Transfer of Property Act and the Indian Succession Act in regard to the quantum and quality of interest that passes under a disposition and the Articles of the Constitution of India set out above, it would still be open to invoke considerations which are inconsistent with modern trends and out of time with modern tendencies. The instant decision has merely followed the previous decisions on the matter and has not in any way touched the question whether a different approach and outlook would be needed at the present time.

NARAYANA DOSSJU VARU *v.* MADRAS HINDU RELIGIOUS ENDOWMENTS BOARD, (1951) 1 M.L.J. 62.

In England the Judicature Act, 1925 (15 and 16 Geo. 5, c. 49) section 45 re-enacting Judicature Act, 1873 (36 and 37 Vic., c. 66) section 25 (8) specially provides that an injunction by interlocutory order may be granted in all cases in which it appears to the Court to be just or convenient. It has been held that the words "just or convenient must be read as "just, as well as convenient", *Day* v. *Brownrigg*[4], *Beddow* v. *Beddow*[5]. A receiver can also be appointed only where it would be just and convenient to do so. It is however settled that the grounds for the award of these remedies are not the same. In India, while in regard to the appointment of a receiver the Court may, whenever it appears to the Court to be just and convenient, do so under Order 40, rule 1, so far as injunction is concerned under Order 39, rule 1 there must be danger of waste, damage or alienation to property before the remedy can be granted. In *Chandidat Jha* v. *Padmanand Singh*[6], an application for the appointment of a receiver under section 503 and for a temporary injunction under section 492 of the Civil Procedure Code of 1882 had been made and in that context the learned Judges pointed out: "the distinction (between a case of injunction and a case of receiver) seems to be that, while in either case, it must be shown that the property should be preserved from waste or alienation, in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case, a good *prima facie* title has to be made out". The question whether in an application for the issue of a temporary injunction and without the parties asking for it, the Court can appoint a receiver has not been previously considered anywhere. It is true that under Order 39, rule 1 the Court may grant a temporary injunction or "make such other order". These latter words will *prima facie* have to be construed *ejusdem generis* only and not as contemplating the award of some other remedy like a receiver which is separately provided for. In the instant case, the learned Judges observe: "No authority has been brought to our notice,

1. (1906) 16 M.L.J. 352.
2. I.L.R. (1937) Mad. 335.
3. (1874) L.R. 2 I.A. 7 (P.C.).
4. (1878) 10 Ch. D. 294, 307.
5. (1878) 9 Ch. D. 89, 93.
6. (1893) I.L.R. 22 Cal. 459.

which holds that if a plaintiff in a suit asks for an injunction restraining the defendant from interfering with his possession of the properties, it is open to the Court to appoint a receiver and thereby dispossess the plaintiff".

RAMALINGA PILLAI *v.* JAGADAMMAL, (1951) 1 M.L.J. 64.

This is an interesting pronouncement on the subject of specific performance of contracts relating to the sale of immovable property. Under section 12 (*c*) of the Specific Relief Act read with the Explanation to that section, the presumption of law is that a breach of contract to transfer immovable property cannot be adequately relieved by the award of money compensation. Where, however, there is evidence that money compensation would be adequate and the fact is so found specific performance cannot be decreed, *Ramji Rao* v. *Kishore Singh*[1]. The position therefore is this : In a suit to enforce a contract to transfer immovable property the Court will grant specific performance unless special reason to the contrary appears. Even a term in the agreement to sell that in case the vendor sells the property to any other person he would be liable for the payment to the transferee his amount together with compensation and damages cannot detract from that right but must be understood as merely providing another remedy to the transferee in the event of the agreement not being carried out by the transferor, *Sobharam* v. *Totaram Sitaram*[2]. Under section 22, the discretion of the Court in awarding specific relief is not arbitrary but should be sound and reasonable and guided by judicial principles. In *Davis* v. *Maung Shwe Co.*[3], it was strongly urged by counsel on behalf of the defence that as a decree for specific performance is discretionary it should not be granted where the transaction is found to be onerous against the defendant. Repelling the argument the Judicial Committee pointed out that in the absence of any evidence of fraud or misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract, the argument cannot be acceded to. Likewise in *Sankaralinga Nadar* v. *Ratnaswami Nadar*[4] it has been held that specific performance of a contract to sell property cannot, where it was for proper consideration, be denied on the ground that subsequently at the time of the suit the value of the property has risen. The case under review pointedly refers to the position that a party entering into a contract for the sale if immovable property should not be allowed to avoid its performance to suit his own convenience by offering to pay damages and pleading that the disappointed party may well be compensated thereby.

SUBBAYYA *v.* RAMALAKSHMI, (1951) 1 M.L.J. 143.

This case decides that whether a suit for maintenance is by a Hindu *wife* or a Hindu *widow*, if a charge is asked for in respect of specified property and a decree is made creating a charge, section 52 of the Transfer of Property Act will apply so as to protect the plaintiff against transfers effected *pendente lite*. The principle of *lis pendens* is based on the maxim *ut lite pendente nihil innovatur*—during a litigation nothing new should be introduced. In *Faiyaz Hussain Khan* v. *Prag Narain*[5]. Lord Macnaghten observed that the correct mode of stating the doctrine of *lis pendens*, as Cranworth, L.C. observed in *Bellamy* v. *Sabine*[6], is : "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect the opponent". As pointed out by Sir George Rankin, C.J., in *Sudhirendra* v. *Ranendra*[7] : "the basis of the doctrine is that parties to a suit cannot be allowed to shorten the arms of the Court in dealing with the suit". The doctrine of *lis pendens* thus operates where it is a property in dispute that is sought to be affected

1. (1929) 57 M.L.J. 205 : L.R. 56 I.A. 280 : I.L.R. 57 Cal. 509 (P.C.).
2. I.L.R. (1949) Nag. 959.
3. (1911) 21 M.L.J. 1127 : L.R. 38 I.A. 155 ; I.L.R. 38 Cal. 805 (P.C.).
4. (1952) 1 M.L.J. 44.
5. (1907) 17 M.L.J. 263 : L.R. 34 I.A. 102 : I.L.R. 29 All. 339 (P.C.).
6. (1857) 1 D. & J. 566.
7. A.I.R. 1930 Cal. 539, 543.

and its object is to see that the Court's dealing with the suit is not in any way prejudiced. In *Jayanti Subbiah* v. *Alamelu Mangamma*[1], it had been stated by Bhashyam Ayyangar, J., that during her husband's lifetime a Hindu wife had no doubt a right of maintenance against him but that was only a matter of personal obligation on the part of the husband quite independent of the possession of any property and it did not form a charge upon the property. The decision only focuses attention to the fact that in the case of a wife *vis a vis* her husband the obligation in respect of her maintenance is of an even higher character than one that arises merely by virtue of possession of property and there is hardly any warrant for reading the observation as postulating any inferiority of the wife's right to maintenance as compared with that of a widow. Nevertheless, in *Rattamma* v. *Seshachalam Sarma*[2], it was so construed. It was also further stated that where maintenance was requested to be made a charge on her husband's properties in a general way she is not asking for any right directly and specifically in respect of any property. Devadoss, J. said : "When a wife brings a suit against the husband for maintenance, and asks for a charge on the property belonging to him she does not ask for any right directly and specifically in respect of the property . . . . The mere fact that she mentions in the plaint all the property belonging to her husband would not make the property the subject-matter of the suit ". Consequently the learned Judge held that the sale of the property by the husband pending the suit is not affected by *lis pendens*. The learned Judge also added : "The liability of the husband to maintain his wife or to provide for her maintenance is a personal one, and if he has property charge will be given against the property . . . . . The case of a widow claiming maintenance from her husband's relations is different and their liability arises from there being family property in their hands ". A similar sentiment was expressed by Jackson, J., in *Official Receiver Cuddapah* v. *Kalawa Subamma*[3]. That however was only by way of obiter. The Bombay High Court also took the same view in *Gangubai* v. *Pagubai*[4], where Justice Lokur observed : " Ordinarily a suit by a Hindu wife for maintenance against her husband is a personal suit and any purchaser of the family property during the pendency of the suit is not affected by the rule of *lis pendens* ". The learned Judge proceeded to add : "But the doctrine of *lis pendens* does apply to a suit for maintenance by a Hindu widow in which she claims to have her maintenance made a charge on specific immovable property and a decree is passed creating a charge on such property ". Lokur, J., follows Devadoss, J., in maintaining a distinction between a wife's claim and a widow's claim to the disadvantage of the former. In *Seetharamanujacharyulu* v. *Venkatasubbamma*[5], pending a suit for maintenance by a widow asking for a charge on properties specified in the plaint, execution was taken out on a decree obtained by a creditor of her husband's brother and one of the main questions discussed was "whether the doctrine of *lis pendens* applies to suits for maintenance where a charge is claimed on specified immovable property ". Wallace and Anantakrishna Ayyar, JJ. observed : "On the question of *lis pendens* we are clearly of opinion that the doctrine applies to a suit for maintenance where the plaintiff claims to have maintenance specifically charged on specific items of immovable properties mentioned in the plaint. In such a case a right to immovable property is directly and substantially in question within the meaning of section 52 of the Transfer of Property Act and therefore the property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party to the suit under any decree which may be made therein ". It is to be noted that the language is general and not restricted to suits for maintenance by widows only. The observations of Devadoss, J., were considered specifically in *Ramaswami Pillai* v. *Krishnaswami Pillai*[6] by Ramesam and Venkatasubba Rao, JJ., and disapproved. That was also a suit by a widow for maintenance and a charge had been claimed generally over all the properties of the

1. (1902) 12 M.L.J. 270 : I.L.R. 27 Mad. 45.
2. (1926) 52 M.L.J. 520.
3. A.I.R. 1927 Mad. 403.
4. A.I.R. 1939 Bom. 403.
5. (1930) 59 M.L.J. 485 : I.L.R. 54 Mad. 132.
6. (1935) 69 M.L.J. 447.

family. Venkatasubba Rao, J. said : "That the doctrine of *lis pendens*, applies to maintenance actions, can on the authorities admit of no doubt . . . Mr. Rajah Aiyar's contention that the rule of *lis pendens* does not apply as the charge was claimed on all the properties of the family, is entirely without force. True, if the properties are not specified or if they are enumerated merely for enabling the Court to fix the quantum of maintenance—in either case the doctrine will have no application, but if the property is sufficiently designated so as to make it directly and specifically the subject-matter of the litigation, the fact that the charge is claimed over all the properties of the family can make no difference. If in *Rattamma* v. *Seshachalam Sarma*[1], is implied a different rule we must with all respect dissent from it". In *Rajya Lakshmidevamma* v. *Subba Rao*[2], there was a claim for maintenance by a wife coupled with a prayer for a declaration of charge on a sufficient portion of the properties mentioned in the plaint. It was held by Varadachariar and Pandrang Row, JJ., that the doctrine of *lis pendens* would be attracted so as to render any transfer of property made *pendente lite* subject to the decree in the suit. The observations of Devadoss, J. in *Rattamma's case*[1] were dissented from. It was observed : "It is sufficient if upon a reading of the pleadings in the case the identity of the property involved in the litigation could be acertained. If that is the true position, we do not see why it should make any difference when the lady who claims maintenance prays that a charge may be declared not on all the properties but on a sufficient portion of the properties. All the properties are involved in the *lis* so far as her prayer is concerned, but she also refers to the undoubted discretion which the Court has to restrict the charge to any reasonable portion of the properties". In the instant case a wife had filed a suit for enhancement of maintenance already decreed to her, many years earlier, and for a charge on the properties set out in the plaint schedule. Four days after the wife's suit had been filed the husband sold certain properties. On the question whether the doctrine of *lis pendens* will apply, an affirmative answer was given in accordance with the later pronouncements of the Madras High Court.

In re K. V. R. S. MANI, (1951) 1 M.L.J. 184.

The principle emerging from this decision is that where with knowledge of all the materials to which a particular witness can speak and with intention to call him as a witness, the prosecution has intimated to the Court that it intends to call him as a witness but fails to do so, the Court cannot exercise its powers under section 540, Criminal Procedure Code to call such person as a Court witness to fill up a gap in the prosecution case. The English practice in these matters is well crystallised. In In re *Enoch and Zaretsky, Bock & Company*[3], it was stated that in a civil suit the judge has no right to call a witness not called by either party unless he does so with the consent of both of the parties. It is also established that that rule does not apply to a criminal trial where the liberty of a subject is at stake and where the sole object of the proceedings is to see that justice is done as between the subject and the State. The decisions in *Regina* v. *Chapman*[4] and *Regina* v. *Holden*[5] establish that the presiding judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, if in his opinion the course was necessary for the furtherance of justice. At the same time, it has been realised that injustice may ensue unless some limitation is imposed as to the point in the proceedings at which the Judge may exercise the right. That limit is to be found in the observations of Tindal, C.J. in *Regina* v. *Frost*[6] : "There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence which contradicts it. They stand or call by the evidence they have given. They must

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1. (1926) 52 M.L.J. 520.
2. A.I.R. 1936 Mad. 84.
3. (1910) 1 K.B. 32 (C.A.).
4. 8 C. & P. 558 : 173 E.R. 617.
5. 8 C. & P. 606 : 173 E.R. 638.
6. 4 St. Tr. (N.S.) 86, 386 : 9 C. & P. 129, 159 : 173 E.R. 771, 784.

close the case before the defence begins, but if any matter arises *ex improviso* which no human ingenuity can foresee on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown ". In *Rex* v. *Dora Harris*[1], Avory, J., points out that while the above rule no doubt applies only to a witness called by the Crown and on behalf of the Crown, the rule will equally apply to a case where a wintess is called in a criminal trial by the judge after the case for the defence is closed and that the practice should be limited to a case where a matter arises *ex improviso* which no human ingenuity can foresee, on the part of a prisoner; otherwise injustice would ensue. The learned Judge also said: "In the circumstances, without laying down that in no case can an additional witness be called by the judge at the close of the trial, after the case for the defence has been closed, we are of opinion that in this particular case the course that was adopted was irregular ". Section 540 of the Criminal Procedure Code is very wide in terms. It enables a magistrate to examine any person as a witness at any stage of a proceeding. Where it is essential to the just decision of the case he is bound to do so. Nor is the section limited only for the benefit of the accused. It will not be an improper exercise of the power merely because such evidence supports the prosecution and not the accused, *Narayanan Nambiar*, In re[2]. The Courts in India have generally taken the view that the very width of the powers given to the magistrate by section 540 requires a corresponding caution in using those powers. In *Sital Singh* v. *Dalganjan Singh*[3], it was held that to put in an entirely fresh list of witnesses by the prosecution after its case was closed would not be permitted by the section. In *Ramachandra Prasad* v. *Emperor*[4], it was found that the object of letting in additional evidence was to close a gap in the prosecution evidence and it was held that section 540 should not be used for the purpose. In *Narayanan Nair* v. *Bhargavi Amma*[5], the original prosecution evidence had disclosed no case against the accused and the court had based its finding on evidence subsequently let and this was considered as not proper. In *Collet* v. *Emperor*[6], the prosecution did not examine the wife of the accused as it was clear that she would not give evidence in favour of the prosecution. So the judge was persuaded to examine her as a Court witness with a view to cross-examine her. It was held that the course was not justified. Following the leads afforded by the several decisions. in the case under review, it was held that although the Court can examine a witness at the instance of the prosecution or defence, still when the prosecution asks the Court to examine him because it could not examine him though it had intended to do so, that should be no ground for the Court to exercise its discretion under section 540, Criminal Procedure Code.

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1. (1927) 2 K.B. 587 (C.C.A.).
2. (1947) 2 M.L.J. 787.
3. (1913) 12 All.L.J. 15.
4. A.I.R. 1937 Pat. 246.
5. (1926) 52 M.L.J. 118.
6. 1929 Mad.W.N. 395: see also *Emperor* v. *Satyendra Kumar*, A.I.R. 1923 Cal. 463.

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Rajagopalan and *Chandra Reddi, JJ.*
16th October, 1951.

Srinivasa Ayyangar *v.* Revenue Divisional Officer, Pollachi.
Appeal Nos. 588, etc., of 1947.

Land Acquisition Act (I of 1894)—Acquisition of agricultural lands—Capitalisation of net income of, for purpose of fixing the quantum of compensation payable—Principles.

Agricultural lands cannot be valued solely on the basis of the return from gilt-edged securities at the time of the acquisition, *i.e.*, the notification under section 4 of the Land Acquisition Act. To that extent agricultural lands differ from two of the other types of immovable property, melwaram interest even in agricultural lands and sites with buildings thereon situate in urban areas. The number of years of purchase should be fixed with reference to the return from gilt-edged securities on a uniform basis for all these three types of property. The years of purchase arrived at on the basis of gilt-edged securities should be fixed in the case of agricultural lands after making due allowance for normal expectations of seasonal failures.

If there is to be a rigid rule that the maximum to be permitted in the case of agricultural lands should be a twenty years' purchase, it should be achieved only by legislation. The Courts cannot and they have not laid down any such rigid and inflexible rule.

Case-law discussed.

G. Srinivasa Ayyangar and *S. Thiruvengadatha Ayyangar* in Appeal No. 588 of 1947; *V. C. Veeraraghavan* in Appeal No. 743 of 1947; The Government Pleader (*P. Satyanarayana Raju*) and *V. Balakrishna Eradi* in Appeal Nos. 760 to 764 of 1947; *D. Ramaswami Ayyangar* and *T. P. Kannabhiran* in Appeal No. 776 of 1947; *M. R. Narayanaswami* in Appeal No. 777 of 1947; *N. C. Vijayaraghavachari* and *N. C. Srinivasan* in Appeal No. 15 of 1948, for Appellants.

The Government Pleader (*P. Satyanarayana Raju*) and *V. Balakrishna Eradi* in Appeal Nos. 588, 743, 776, 777 of 1947 and Appeal No. 15 of 1948; *N. C. Vijayaraghavachari* and *N. C. Srinivasan* in Appeal No. 760; *M. R. Narayanaswami* in Appeal No. 761; *G. Srinivasa Ayyangar* and *S. Thiruvengadatha Ayyangar* in Appeal No. 762; *V. C. Veeraraghavan* in Appeal No. 763; *D. Ramaswami Ayyangar* and *T. P. Kannabiran* in Appeal No. 764, for Respondents.

K.S. ——— *Appeals dismissed.*

Subba Rao, J.
1st November, 1951.

Kalidas *v.* Fakir Mohammad Sahib.
S. A. No. 712 of 1948.

Civil Procedure Code (V of 1908), Order 34, r. 4 (4)—Puisne mortgagee impleaded in first mortgagee's suit—Right to apply for final decree.

A puisne mortgagee who has been impleaded in a suit by the first mortgagee and obtains a preliminary decree can (even if the mortgagor has paid off the first mortgagee) apply for a final decree in the same manner as the plaintiff might have done under clause (4) of rule 4 of Order 34 of the Code of Civil Procedure. Order 34, rule 4 (4) is not exhaustive of the terms to be embodied in a preliminary decree for the sub-rule provides for such variations as the circumstances of the case may

require. When there is a preliminary decree in favour of the puisne mortgagee, unless that decree is discharged by any of the ways known to law, the party in whose favour such a decree is made will be entitled to pursue the other and necessary steps to realise the amount decreed to be paid to him.

(Case-law considered).

P. Somasundaram and *P. Suryanarayana* for Appellant.

Respondent not represented.

K.S. ——— *Appeal allowed. Leave refused.*

[Full Bench]

Rajamannar, C.J., Raghava Rao and Venkatarama Ayyar, JJ.
9th November, 1951.

Dakshinamoorthy *v.* Thulija Bai.
C. M. P. No. 4955 of 1950.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 7 (3) (a) (i) *—Premises suitable for residential purposes let out for non-residential purpose—Landlord if can claim the same for his own occupation as residential premises.*

What is at the inception a residential building may well become a non-residential building by force of the terms of the letting and any conversion after the letting, of a residential building into a non-residential one may well take place within and only within the limits which the statute prescribes. That, if prior to a letting, a building happens to have been of one character it must for ever keep that character irrespective of what the effect of the letting or of the acts of parties subsequent to the letting may be, seems to be difficult, if not, impossible position. The original design of the structure may have been one suitable to residence, but if by the letting it becomes non-residential in character, there is no reason why one may not take it as such for the purpose of section 7, sub-section (3). If a landlord has let out a building for a residential or non-residential purpose as the case may be it is only fair that when he seeks an order directing the tenant to put him in possession of the property, he has to show that he fulfils the requirements of sub-clauses (*i*) or (*ii*) of clause (*a*) of sub-section (3) of section 7. Having let out the building as for a non-residential purpose, it would be unfair if he were allowed to urge the requirement of the building for his own occupation which is really a condition of his seeking to recover a residential building let out by him. The purpose of the letting and the condition of the landlord's recovery have alike reference to a residential or non-residential purpose according as a given case falls under sub-clause (*i*) or sub-clause (*ii*) of sub-section (3) (*a*) of section 7.

R. Ramamoorthy Aiyar, A. Nagarajan and *A. Viswanathan* for Petitioner.

P. S. Panjatchara Mudaliar for 1st Respondent.

K.S. ——— *Application allowed.*

Subba Rao, J.
9th November, 1951.

Adinarayana and Brothers *v* The State of Madras.
W. P. No. 245 of 1951.

Madras General Sales Tax Act (IX of 1939)*—Petition for issue of* writ of certiorari *for setting aside orders of assessment by Commercial Tax officer confirmed on appeal and Revision by Board of Revenue—Not sustainable as other remedy by civil suit is available.*

A petition for the issue of a writ of *certiorari* for setting aside the order of the Board of Revenue, rejecting a revision petition against an appellate order confirming an order assessing sales tax, is not sustainable as the aggrieved assessee could have filed a suit in a civil Court for the relief.

T. S. Narasinga Rao and *N. Balachandrudu* for Petitioners.

The Government Pleader (*P. Satyanarayana Raju*) on behalf of the State.

K.S. ——— *Application dismissed.*

Rajamannar, C.J. and Venkatarama Ayyar, J.
13th November, 1951.

Sambandam *v.* General Manager, South Indian Railway.
C. M. P. No. 14078 of 1950.

Constitution of India (1950), *Articles* 310 *and* 311 —*Scope—Railway Safeguarding of National Security Rules—Dismissal of Railway servant under—Necessity to conform to the rules*

The Government has a right to terminate the services of a civil servant at will and the only restrictions on this power are those expressly enacted in the Constitution. Though a Railway administration has a right to terminate the services of an employee under rule 145 of the Indian Railway Establishment Code that rule does not apply to a case where an employee is dismissed under the Railway Safeguarding of National Security Rules. In such a case unless the procedure prescribed by those rules had been properly followed the dismissal is wrong. Whether in fact it was a case of termination of services or dismissal is a question of fact to be determined on the circumstances of the case. An order for compulsory retirement falling within rule 3 of the Railway Safeguarding of National Security Rules cannot be said to be one terminating the services. Where the procedure prescribed in rule 4 of the Rules have not been followed (in that no notice of the final order proposed to be taken was given to the employee) the order of dismissal is illegal and inoperative and must be quashed by a writ of *certiorari*.

The rule that the Court will not ordinarily interfere with an order where there is another adequate remedy available to the party is a rule of discretion for the guidance of the Court and not a limitation on its power.

K. V. Ventatasubramania Ayyar for *Row and Reddy* for Petitioner.

O. T. G. Nambiar for *King and Partridge* for Respondent.

K.S. *Order quashed.*

Rajamannar, C.J. and Venkatarama Ayyar, J.
15th November, 1951.

Abdul Azeez *v.* Pathuma Bi.
C. R. P. No. 300 of 1951.

Civil Procedure Code (*V of* 1908), *Order* 32—*Muslim woman who is major according to her personal law but minor under the Majority Act—Cannot bring a suit for dissolution of marriage unless represented by a next friend.*

A Muslim woman who is a major according to her personal law but is a minor according to the provisions of the Indian Majority Act, is not entitled to bring a suit for dissolution of her marriage without being represented by a next friend. 3 Mad. 248, reaffirmed. 17 Luck. 572, approved. 55 Bom. 160 : A.I.R. 1948 Cal. 66, dissented from. Where such a suit is filed by a minor without next friend the proper course is to return the plaint as not having been properly presented and not to dismiss the same on account of the defect in the presentation.

C. S. Swaminatha Ayyar for Petitioner.

B. Pocker and *S. M. Mohideen* for Respondent.

K.S. *Petition allowed.*

(Full Bench)

Satyanarayana Rao, Rajagopalan and Chandra Reddi, JJ.
19th November, 1951.

Venkataratnam *v.* Seshamma.
A. A. O. No. 460 of 1950.

Madras Agriculturists Relief (*Amendment*) *Act* (*XXIII of* 1948), *section* 16, *clauses* (ii) *and* (iii)—*Respective scope and application.*

Clause (*ii*) of section 16 of Madras Agriculturists Relief (Amendment) Act (XXIII of 1948) applies to pending proceedings, that is proceedings which were instituted before the commencement of the Act but which did not become final before such commencement. It implies therefore that if the decree or order passed in a suit or proceeding became final before the commencement of the Act the provisions of the Act cannot be applied to such suit or proceeding. But in

clause (*iii*) of section 16, the words "in which the decree or order passed has not become final" do not occur. It is quite general and applied to all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act so that it seems to apply to decrees or orders even if they had become final before the commencement of this Act provided the decree or order has not been executed or fully satisfied. A reading of section 16 (*ii*) and (*iii*) would suggest that clause (*iii*) would apply exclusively to executable decrees or orders which though they have become final before the commencement of the Act are still in the stage of unfinished execution and at the stage at which satisfaction was not fully received.

The view taken by Subba Rao and Somasundaram, JJ., in C. M. A. Nos. 316 and 391 of 1947 held to be erroneous and overruled.

C. Rama Rao for Appellant.

K. Umamaheswaram, A. Kuppuswamy and *T. Ramachandra Rao* for Respondents.

K.S. *Appeal allowed and application remanded.*

Subba Rao, J.
21st November, 1951.

Krishnayya *v.* Subbarayudu.
S. A. No. 1008 of 1948.

Madras Agriculturists Relief Act (*IV of* 1938), *section* 9—*Not applicable to debts incurred after the Act came into force.*

Where in respect of renewals of pronotes no portion of a debt has been incurred before 1st October, 1932, the debt cannot be traced back and the debtor is only entitled to get under section 9 of the Agriculturists Relief Act in respect of such debt the relief of reducing the rate of interest as provided therein. The Amending Act, XXIII of 1948, has not effected any change in this respect. (1943) 1 M.L.J. 231, relied on. (1945) 2 M.L.J. 565 and (1942) 2 M.L.J. 307, referred to.

M. S. Ramachandra Rao and *M. Krishna Rao* for Appellant.

U. Sethumadhava Rao for Respondent.

K. S. *Appeal dismissed. Leave refused.*

Subba Rao, J.
23rd November, 1951.

Khader Basha Sahib *v.* Kamalamma.
A. A. A. O. No. 204 of 1949.

Madras Agriculturists Relief Act (*IV of* 1938), *section* 4 (*h*)—*Amendment of* 1948 *raising amount of value of property owned by woman creditor to Rupees* 6,000 *coming into operation when appeal was heard—Necessity to give opportunity to debtor to let in further evidence to show the value.*

Where the amendment of section 4 (*h*) of the Madras Agriculturists Act in 1948 (raising the value of the property owned by a woman from Rs. 3,000 to 6,000 to exempt her from the operation of the Agriculturists Relief Act) came into operation at the time of hearing the appeal, it is but fair that another opportunity should be given to the parties to adduce evidence on the basis of the new amendment. The person who claims exemption under section 4 (*h*) will have to establish that she came under the provision. But when the entire evidence has been adduced in a case, the burden of proof is not really material.

K. Vallabesiwara Rao for Appellant.

Messrs. Ramanujam and *Venkataseshayya* for Respondent.

K.S. *Application remanded.*

Rajagopalan, J. Prabhakara Pattabi Rama Rao *v.* Venkata Subbamma.
23rd November, 1951. A. A. A. O. No. 88 of 1950.

Civil Procedure Code (V of 1908), *section* 60 (1) (c)—*Scope—Agriculturist—Test—Woman not cultivating lands personally—If entitled to benefit of section* 60 (1) (c).

It is not one of the conditions that the person claiming the benefit of section 60 (1) (*c*), Civil Procedure Code, must himself or herself actually cultivate the land. Cultivation of the land through any agency in part or in whole would not be sufficient to take him or her outside the scope of section 60 (1) (*c*) of the Civil Procedure Code. If a debtor is dependent upon the cultivation of the lands and is unable to maintain herself otherwise will make her entitled to claim protection as an agriculturist. That the whole of the cultivation was carried on through paid servants does not make her any the less an agriculturist within the meaning of section 60 (1) (*c*) of the Civil Procedure Code. (1937) 2 M.L.J. 11 : I.L.R. (1937) Mad. 777 (F.B.), referred to.

M. P. Somasundaram for Appellant.

D. Narasaraju for Respondent.

K.S. *Appeal dismissed. Leave refused.*

Ramaswami, J. Vepa Reddi, *In re.*
28th November, 1951. Cr. R. C. No. 1204 of 1951.
(Cr. R. P. No. 1173 of 1951.)

Cattle Trespass Act (I of 1871), *section* 10—*Specific finding that there has been damage—If essential to warrant seizure of trespassing cattle.*

A specific finding that there has been damage is not essential to warrant seizure of the trespassing cattle. The absence of such a finding will not vitiate the proceedings.

Narayanaswamy Mudaliar and *V. Sriramamurthy* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. *Conviction confirmed and sentence reduced.*

Ramaswami, J. Narasimhulu Chetty, *In re.*
28th November, 1951. Cr. R. C. No. 1059 of 1951.
(Cr. R. P. No. 1040 of 1951.)

Cotton Textile Control Order (1948)—*Excess unaccounted for only four yards—Law should ignore such trifles—Penal Code (XLV of* 1860), *section* 95—*Applicable.*

Where the excess unaccounted for is only four yards, law should ignore such trifles. Section 95 of the Penal Code is applicable.

A. Subramaniam for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K.S. *Petitioner acquitted.*

Ramaswami, J. Malliah, *In re.*
30th November, 1951. Crl. R. C. No. 373 of 1951.
(Crl. R. P. No. 372 of 1951).

Criminal Procedure Code (V of 1898), *section* 263—*Bench Court—Summary trial—Proper procedure.*

Where the records of a summary trial before a Bench of Magistrates does not show the nature of the accusation against the accused, the substance of the evidence

of the prosecution witnesses from which it can be inferred which such evidence was believed by the Magistrate and the defence of the accused if any, the conviction and sentence by the Bench Court must be set aside.

J. V. Suryanarayana Rao, M. S. Ramachandra Rao, M. Krishna Rao and *C. S. Govindaswami* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. *Petition allowed.*

Ramaswami, J.
3rd December, 1951.

Periah *v.* Chendriah.
Crl. R. C. No. 684 of 1951.
(Crl. R. P. No. 678 of 1951.)

Penal Code (XLV of 1860), *section* 341—*Wrongful restraint—Gist of offence.*

The offence of wrongful restraint is linear in its scope, while wrongful confinement is circular in its character. Wrongful restraint is keeping a man out of a place where he wishes to be and has a right to be. Physical presence of the obstructor is not necessary; nor is any actual assault necessary and fear of immediate harm restraining a man out of a place where he wishes to be and has a right to be is sufficient to constitute an offence under the section. The slightest unlawful obstruction to the liberty of the subject to go when and where he likes to go, provided he does so in a lawful manner, cannot be justified and is punishable.

B. Lakshminarayana for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

M. A. Narasappa Chowdhari for Respondent.

K.S. *Order modified.*

Ramaswami, J.
3rd December, 1951.

Parthasarathy and others, *In re.*
Crl. R. C. No. 687 of 1951.
(Crl. R. P. No. 681 of 1951.)

Madras City Police Act (III of 1898), *sections* 45 *and* 46—*Scope.*

Where it is found that certain friends occupying the same premises and finding nothing more useful to employ their time than a friendly game of cards were found playing cards and that apparently on account of ill wishers to them the police have been tipped off and a raid had been arranged and search warrant had been granted without adequate care and attention and a wholly unnecessary prosecution had taken place and a wholly unwarranted conviction had followed, it must be set aside. Sections 45 and 46 of the Madras City Police Act is not applicable to such a case.

T. M. Venugopal Mudaliar for Petitioners.

The State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

K.S. *Order set aside.*

Ramaswami, J.
5th December, 1951.

Narayanareddi and others, *In re.*
Cr. M. P. No. 2255 of 1951.

Criminal Procedure Code (V of 1898), *section* 437—*Interference—Point of law—Order of commitment rested on no acceptable and valid evidence—If point of law.*

The term point of law has been construed by High Courts in various decisions and includes an order of commitment rested upon no acceptable and valid evidence and the High Court can interfere and quash such a commitment.

V. C. Gopalaratnam and *L. V. Krishnaswami* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

R. V. Raghavan for 2nd Respondent.

K.S. *Commitment quashed.*

Ramaswami, J.
5th December, 1951.

Malayandi Thevar, *In re.*
Cr. R. C. Nos. 989 to 991 and 1092 of 1951.
(Cr. R. P. Nos. 971 to 973 and 1070 of 1951.)

Madras Food Grains (Intensive Procurement) Order (1950), *clause* 3 (2) *and Essential Supplies (Temporary Powers) Act (XXIV of* 1946), *section* 7 (1)—*Notification by Collector for surrender of surplus food grains to the Government—Validity—Contravention—Offence.*

Section 3 (1) of Act XXIV of 1946, lays down that the Central Government so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices may by notified order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein. Sub-clause (2) provides that without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may provide: ". . . . .. . (*f*) for requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices and to such persons or class of persons or in such circumstances, as may be specified in the order." Section 4 provides that the Central Government may by notified order direct that the power to make orders under section 7 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the directive, be exercised by (*a*) such officer or authority subordinate to the Central Government, or (*b*) such Provincial Government as may be specified in the direction. Section 2 (*d*) of the same Act defines a "notified order" to mean an order notified in the Official Gazette. The term Official Gazette has been construed in relation to Madras as the Madras *Fort St. George Gazette*. In exercise of the powers under section 3 of the Essential Supplies (Temporary Powers) Act, 1946, read with the notification of 21st October, 1946, by the Government of India, G. O. No. 1269, Food and Agriculture, dated 30th June, 1950, was published in the *Fort St. George Gazette*, by the Governor of Madras with the concurrence of Government of India, following Madras Food Grains (Intensive Procurement) Order, 1950. The State Government has in fact in exercise of its delegated powers passed various orders like the Food Grains (Intensive Procurement) Order, 1948, 1950, etc., comprehensively laying down the principles on which the categories of persons to whom these orders apply, the grounds on which the surplus should be determined, the mode of taking delivery and the payment against delivery and providing for removal of difficulties in the way of getting at undisclosed stocks, etc. The State Government has not empowered the Collectors of Districts to lay down the principle regulating or controlling but only to carry out the working of the principles and find out what the surplus is. The notification by a District Collector for surrender of surplus food grains to the Government cannot be said to be one in the exercise of a delegation of a delegated power. Accordingly such a notification by the District Collector is valid and contravention of it would be an offence.

T. R. Srinivasa Ayyar and *S. Krishnaswami* for Petitioners.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

K.S. *Petitions dismissed.*

Ramaswami, J.
6th December, 1951.

Public Prosecutor, Madras *v.* Kamalpasha.
Cr. A. No. 680 of 1951.

Cotton Textile Control Order (1948), *section* 3 (c)—"*Dealer*"—*Salesman or manager in charge of sales—Liability as "dealer" for selling mill cloth at price in excess of controlled one.*

The definition of a dealer, *viz.*, a person carrying on business of selling any article, whether wholesale or retail is sufficiently wide to include a salesman or a manager in charge of sales. A.I.R. 1945 Cal. 319 (Crl.), relied on. Such a person will

plainly be guilty of selling mill cloth in excess of the price as "dealer" within the meaning of section 3 (*c*) of the Cotton Textile Control Order, 1948.

(In the circumstances it was not deemed necessary to set aside the acquittal.)

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) the Appellant in person.

K.S. *Subject to clarification of legal position appeal dismissed.*

Panchapakesa Ayyar, J.
10th December, 1951.

Karuppa Servai *v.* Kundaru.
Cr. M. P. No. 2437 of 1951.

Criminal Procedure Code (*V of* 1898), *section* 337 (3)—*Approver—Release on bail before he has deposed at the trial to matters within his knowledge—Propriety—Sections* 497 *and* 498—*If applicable to case of approver.*

Neither the inquiring Magistrate nor the Sessions Judge has got the right to set at naught the mandatory provisions of section 337 (3), Criminal Procedure Code, based on very salutary principles of public policy and public interest, and release an approver who is not on bail at the time of his acceptance of the tender of pardon, after the approver has deposed only in the committing Magistrate's Court, that is, in the course of the preliminary inquiry, and before the inquiry has ended, and, if committal ensues, before he has deposed at the trial in the Sessions Court truly and fully to matters within his knowledge. An approver cannot be placed in the same position as an accused and the provisions of sections 497 and 498, Criminal Procedure Code, cannot apply to him. Even if sections 497 and 498 apply it would not be a fit case for releasing an approver on bail in a murder case. Besides an approver has to be kept in safe custody till the conclusion of the trial or inquiry if no committal ensues.

V. Rajagopalachari and *K. Vaitheeswaran* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

C. K. Venkatanarasimham for Respondent (approver).

K.S. *Petition allowed.*

Subba Rao, J.
14th December, 1951.

Shaik Abdul Khader & Co. *v.* Subramania Pillai.
W. P. No. 713 of 1951.

Imports and Exports (*Control*) *Act*, 1947—*Restrictions imposed by—If violates fundamental rights under Article* 19 *of Constitution.*

The Imports and Exports (Control) Act, 1947, was enacted for the purpose of continuing for a limited period powers to prohibit or control imports and exports. Under section 3, the Central Government was authorised to make an order prohibiting, restricting or otherwise controlling in all cases, or, in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the import, export, carriage coastwise or shipment by ships, stores of goods of any specified description. The policy was designed to conserve essential supplies for civilian consumption in this country. Provision is made for regulation by permits and appeal is provided as regards grant or refusal of permits. The restrictions imposed are reasonable within the meaning of Article 19 (6) of the Constitution and the machinery provided for the implementation of the policy is not unsatisfactory. The Act does not violate the fundamental rights under the Constitution.

M. K. Nambiyar, K. C. Jacob and *S. K. L. Rattan* for Petitioner.

N. Rajagopala Ayyangar for Respondents.

V. V. Raghavan for the Government Pleader (*P. Satyanarayana Raju*) on behalf of the State.

K.S. *Application dismissed.*

Chandra Reddi, J.
14th November, 1951.

Annamalai Ammal *v.* Sundarathammal.
S. A. No. 835 of 1948.

Hindu Law—Joint family—Gifts—Gift of immoveable property by a father to daughter—Validity.

A gift of immoveable property by a Hindu father to his daughter, if within reasonable limits, is valid and cannot be questioned by the sons even though such a gift was made before the marriage. A gift of moveable or immoveable property whether on the occasion of a marriage or before or after the marriage can be made by a father within reasonable limits to a daughter.

K. Veeraswami for Appellant.

V. Meenakshisundaram for *V. Ramaswami Aiyar* for Respondents.

K.S. —————— *Appeal allowed. Leave granted.*

Subba Rao, J.
27th November, 1951.

Appa Rao *v.* Veeranna.
S. A. No. 1007 of 1948.

Transfer of Property—Purchase with notice of prior agreement for sale to another—Effect—Rights of person under prior agreement.

An agreement to sell immoveable property does not create any interest in the said property unless a sale deed is executed conveying the said property. The vendor, who has not transferred his interest in the property, though he entered into an agreement with another to sell the same, can certainly confer title on a third party by executing a sale deed in his favour. As between the vendor and the subsequent purchaser, there can be little doubt that there is a transfer of ownership and therefore the title to the property vests in the latter. But the title of the subsequent purchaser with notice of the prior agreement in favour of another is subject to the obligation under section 91 of the Indian Trusts Act. He holds the property for the benefit of the latter to the extent necessary to give effect to the contract. The person in whose favour there was a prior agreement can specifically enforce his agreement under section 27 (2) of the Specific Relief Act and compel him to execute a sale deed in his favour. But till such a sale deed is executed by the subsequent purchaser, the person in whose favour there was a prior agreement cannot acquire any title to the same. If the contract for the purchase of immoveable property with the original owner does not create any interest in him, the subsequent sale by the owner to a third person cannot confer a better title on him. He can only acquire title to the property by getting a conveyance from the subsequent purchaser. The execution of a sale deed by the original owner without the subsequent purchaser joining the sale will not confer any title on the person in whose favour there was a prior agreement to sell.

K. Rajah Aiyar and *Bapiraju* for Appellants.

M. S. Ramachandra Rao and *K. V. Rangachari* for Respondent.

K.S. —————— *Appeal dismissed. Leave refused.*

Mack, J.
27th November, 1951.

Cosmopolitan Club, Madras *v.* Deputy Commercial Tax Officer, Triplicane Division.
C. M. P. Nos. 3414 and 3415 of 1951.

Constitution of India (1950), *Article* 226—*Scope of jurisdiction to issue writs—Other remedy—Existence of—Effect—Madras General Sales Tax Act* (IX of 1939), *section* 2 —*Supply of refreshments to members of social club—If liable to sales tax.*

The maintainability of writ petitions under Article 226 of the Constitution is extremely difficult if not impossible to circumscribe, define and restrict. The mere failure of the petitioner (The Cosmopolitan Club) to object to the payment of sales tax (on the supply of refreshments to its members) since 1939 and to explore the long and tedious avenue of appeal and revision provided by the Sales Tax Act is not an impediment in the way of issuing a writ if it be found that the sales tax levy is really illegal.

The writs under Article 226 (1) are all discretionary writs, which are dependent on the facts of each case and the nature of the illegality and wrong alleged.

The general principle would be that Government should have notice of the alleged illegality or wrong on which the writ petition is founded before it is filed

and given a reasonable opportunity of investigating the grievance and remedying it before such a step is taken. There is of course no provision in the Constitution requiring notice to Government before putting it on its defence as under section 80, Civil Procedure Code. There is no inflexible rule. The petitions in the instant case in the particular circumstances should not be rejected on the ground that the Government was not given previous notice. The legality of the levy of sales tax in the circumstances can only be properly investigated by the High Court on a petition under Article 226.

Where a social club being an association formed not for profit supplies refreshments to its members at a fixed rate the supply is not a transfer of property from the club as such to a member. The levy of sales tax on such supplies of refreshments by clubs to members must be held to be illegal.

K. S. Jayarama Aiyar, C. K. Venkatanarasimham and *Padmini Raghavan* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) and *V. P. Sarathy* for the State Council on behalf of the Respondents.

K.S. —————— *Writ issued.*

Rajamannar, C.J. and Venkatarama Ayyar, J. Subbiah *v.* Raghavulu.
28*th November*, 1951. W. P. No. 343 of 1951.

Constitution of India (1950), *Article* 226—*Jurisdiction under—Cannot be exercised on an executive direction by the Magistrate to the Police to take a particular action under section* 107, *Criminal Procedure Code.*

The High Court cannot be called upon to exercise its jurisdiction under Article 226 of the Constitution simply on an executive direction by the Stationary Sub-Magistrate to the Police to take a particular action under section 107, Criminal Procedure Code. That order does not purport to decide finally the rights of the petitioner.

D. Munikanniah and *R. D. Indrasenan* for Petitioner.

A. Raghaviah for Respondents.

K.S. —————— *Application dismissed.*

Rajamannar, C.J. and Veerappa Chettiar *v.* State of Madras.
Venkatarama Ayyar, J. C. M. P. Nos. 6914 of 1950, etc.
13*th December*, 1951.

Madras Estates (*Abolition and Conversion into Ryotwari*) *Act* (*XXVI of* 1948)—*Constitutional validity.*

On account of the passing of the Constitution (First Amendment) Act, 1951, and the recent decision of the Supreme Court in (1951) S.C.J. 775 which held that Act to be valid, it is no longer open to a party to contend that the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, has become void as being inconsistent with, or taking away, or abridging, any of the rights conferred by any of the provisions of Part III of the Constitution of India. Article 31 (6) of the Constitution would prevent the Court from calling into question a law (or Act like the impugned one) coming within the purview of that clause which is liable to be challenged only on the ground by that clause, *viz.*, that it contravenes provisions of clause (2) of Article 31 or has contravened section 299 (*a*) of the Government of India Act, 1935 and which must be held to be valid law because it cannot be called into question on that ground which renders it invalid. The words " any law of the State " mean any Act, Ordinance or order enacted by the State without any reference to its validity. Opinion of Das, J., in 29 Pat. 790 approved and that of Sinha, J., dissented from. A writ of *certiorari* cannot issue to declare the impugned Act invalid as repugnant to Article 31, clause (2). The impugned Act does relate to compulsory acquisition of interest in land and therefore falls within Entry 2 of List 2 of schedule VII of the Government of India Act, 1935.

The declaration in section 3 of the impugned Act only means that the vesting is for the purposes of the Province and there is no inconsistency with section 175 (2) of the Government of India Act, 1935.

Madras Act XXVI of 1948 is not invalid on the grounds urged.

R. Kesava Aiyangar for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and *V. P. Sarathy* for the Government Pleader, instructed by the State Counsel (*John and Row*) on behalf of the Respondent.

K.S. ——— *Petitions dismissed.*

Panchapakesa Ayyar, J. Krishna Reddi, *In re.*
13th December, 1951. Cr. M. P. No. 2481 of 1951.

Criminal Procedure Code (*V of* 1898), *section* 337 (3)—*Approver—Cannot be let out on bail pending trial.*

An approver who has accepted tender of a pardon must be detained in custody under section 337 (3), Criminal Procedure Code, till the termination of the trial if committal ensues or till the termination of the inquiry if committal does not ensue. The fact that he is said to have turned hostile is immaterial. That the other accused have been let off on bail is immaterial. That the other witnesses are not detained in custody is also immaterial.

A. Ramachandran instructed by *Rao and Reddy* for Petitioner.

Santhanam for the Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K. S. ——— *Petition dismissed.*

Subba Rao, J. Themmalapuram Bus Transport, Ltd. *v.* The State of Madras.
9th January, 1952. W. P. No. 602 of 1951.

Motor Vehicles Act (*IV of* 1939), *section* 43-*A—Power of Government to issue directions to Transport Authority—Limits—Direction to take into consideration need for rehabilitation of ex-servicemen—Validity.*

The Government cannot by issuing a notification under section 43-A of the Motor Vehicles Act direct the Regional Transport Authority in issuing a permit, to take into consideration matters not germane to the issue of permits. The need for the rehabilitation of ex-servicemen is obviously a consideration not germane to the issue of permits for motor buses. Rehabilitation of ex-servicemen may be a meritorious act; but their rehabilitation is a circumstance absolutely unconnected with any matter relating to road transport. It is neither necessary nor advisable to attempt to particularise the valid notifications that can be issued by the Government under section 43-A of the Act. But a notification directing the Regional Transport Authority through the Central Road Traffic Board, to pay regard to the need for rehabilitation of ex-servicemen in dealing with applications for stage carriage permits is illegal. But the provisions of the Act do not preclude the Tribunals concerned from issuing a permit to a Motor Transport Co-operative Society, Limited, for ex-servicemen if it is otherwise qualified to have a preferential right to the issue of a permit. The fact that the District Collector is the ex-officio President of the co-operative society does not disqualify him from being appointed as a member of the Regional Transport Authority. But the Transport Authority of which the District Collector as chairman took part in issuing a permit to the co-operative society of which the Collector was president exposes itself to the apprehension that there was bias. Such an issue of permit is opposed to the principles of natural justice and not valid.

M. K. Nambiar and *C. F. Louis for* Petitioner.

V. V. Raghavan for the Government Pleader (*P. Satyanarayana Raju*) on behalf of the State.

N. Sundaram Ayyar for 4th Respondent.

K.S. ——— *Orders of Respondents set aside.*

Subba Rao, J. Bangararaju *v.* Vishakapatnam Co-operative Motor Transport, Ltd.
th January, 1952. C.M.P. Nos. 7184 and 7185 of 1951.

Motor Vehicles Act (*IV of* 1939), *Collector, Chairman Regional Transport Authority—Issue of bus permit to Co-operative Society of which the Collector is President—Opposed to principles of natural justice.*

The Regional Transport Authority whose chairman is the Collector of the District cannot issue a bus permit to a Co-operative Society of which that Collector is also the President. Such issue of permit will be opposed to the principles of natural justice. Decision in W.P. No. 602 of 1951, followed.

K. Rajah Iyer and *K. Mangachari* for Petitioner.

V. P. Sarathi for the Advocate-General (*V. K. Thiruvenkatachari*), for the Government Pleader (*P. Satyanarayana Raju*), *D. V. Reddi Pantulu* and *D. Narasaraju* for Respondents.

K.S. *Order issuing permit to 1st Respondent quashed.*

Ramaswami, J.
17th January, 1952.

Public Prosecutor *v.* Kandaswami Mudali.
Cr.R.C. No. 118 of 1951.
(Cr.R.P. No. 117 of 1951.)

Criminal Procedure Code (V of 1898), section 471—Procedure to be followed where the accused guilty of murder is found to be lunatic at time of commission of offence.

Where the accused a lunatic is found to be guilty of murder the proper procedure to be followed is to order as follows :—" . . . having found the accused guilty under section 302, Indian Penal Code, but insane at the time of the commission of the act I acquit him and direct him to be detained in the Mental Hospital and the action taken by me will be reported to the State Government." (The detention should be in the Mental Hospital, Madras, because the State Government has prescribed in G.O. No. 1096 (Public) dated 29th August, 1913, the mental hospitals to which particular criminal lunatics of particular district should be sent namely the Mental Hospitals at Madras, Calicut and Vishakapatam ; and Salem criminal lunatics have to go to the Mental Hospital, Madras). After making such order the Sessions Judge should detain the criminal lunatic in the jail and address the Executive District Magistrate for making arrangements for the removal of the criminal lunatic to the Mental Hospital concerned. The subsequent responsibility for removal of the lunatic to the Mental Hospital lies with the Executive District Magistrate, the Medical officer of the Jail and the Police. The Court cannot decide to release the criminal lunatic and entrust him to the safe custody of his relatives. The privilege of deciding whether the accused shall be released or not lies with the State Government and not with the Court. On the removal of the lunatic to the Mental Hospital it will be open to his relatives to apply to the State Government for the release of the criminal lunatic on conditions.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) in person.

C. Desiadayalu for Respondent.

K.S. *Order varied.*

Krishnaswami Naidu, J.
24th January, 1952.

Ramabhadra Iyer *v.* Jagannatham.
Application No. 155 of 1952.
(C.S. No. 532 of 1949).

Practice—Mortgage decree—Application for execution by way of sale—Failure to bring on record—Receiver appointed in the meanwhile—Effect—Practice on the Original Side.

Where proceedings for execution of a mortgage decree to bring the hypotheca to sale are started earlier, and a Receiver is appointed some time later, further proceedings in execution should not be pursued or proceeded with, without impleading the Receiver as a party to the proceedings and giving notice to him.

Where the proclamation of sale was settled by the First Assistant Registrar on the Original Side and the sale was directed to be held by the Official Referee but without notice in the Receiver who had been appointed earlier, further proceedings are liable to be stayed, pending steps to bring the Receiver on record.

K. S. Ramabhadra Iyer Receiver Applicant.

N. K. Mohanarangam Pillai and *C. Loganatha Mudaliar* for Defendant.

T. K. Subramania Pillai for Plaintiff.

K.S. *Sale stayed.*

Rajamannar, C.J. and Venkatarama Ayyar, J.
3rd November, 1951.

Indian Metal and Metallurgical Corporation *v.* Industrial Tribunal, Madras. Writ Petition No. 260 of 1951.

Constitution of India (1950), *Article* 19 (1) (g)—*Industrial Disputes Act* (*XIV of* 1947)—*Right of employer to close down his business—Jurisdiction of Tribunal to decide whether an employer is entitled to close down—Government has no jurisdiction to refer the question for decision of the tribunal.*

The right conferred by Article 19 (1) (*g*) to carry on any business is not absolute. Undeniably the State has got the right to regulate any business, and it is not confined to 'public utility' business only. The freedom of contract can to a certain extent be curtailed if such curtailment is reasonable and in the general interests of the public. But if a citizen has got a right to carry on a business, it follows he must be at liberty not to carry it on if he so chooses.

The Industrial Tribunal has got the jurisdiction to adjudicate on the question whether a particular lockout was justified or not, but it cannot decide the question whether an employer can close down his business temporarily for an indefinite period or permanently.

The Government by their G. O., referred to the Industrial Tribunal an industrial dispute alleged to have arisen between the workers and the management of the petitioner (a factory) and one of the matters said to be in dispute was whether the closure of the factory from a particular date was justified. The Industrial Tribunal found that none of the reasons given by the management would have really justified the closing down of the factory, and directed the petitioner to carry on the business. On a petition to quash the order and award of the tribunal,

Held, (i) the award in so far as it directs the petitioner to continue to carry on the business is void as it is inconsistent with the Constitution.

(ii) Closing down a business even temporarily is distinct and different from lockout and Industrial Tribunal cannot decide the question whether an emploper can close down his business. That question is completely outside the scope of the Industrial Disputes Act and the reference by the Government was without jurisdiction and consequently the award was bad.

K. V. Venkatasubramania Aiyar and *R. Vaidyanathan* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) instructed by the State Counsel (*John and Row*) and *K. Bashyam* for *Messrs. Arunachalam* and *Jagannatha Das* for Respondents.

V.P.S. *Order quashed.*

[Full Bench.]
Rajamannar, C.J., Raghava Rao and Venkatarama Ayyar, JJ.
16*th November*, 1951.

Radhakrishna Rao *v.* The Province of Madras. Appeals Nos. 365, etc. of 1947.

Madras General Sales Tax Act (*IX of* 1939), *section* 2 (b)—*Commission agents—If and when " dealer " liable to sales tax.*

A broker is an agent employed to make a bargain for another and receives a commission on the transaction which is usually called brokerage. He has usually neither the custody nor the possession of the goods. It is the broker's duty to establish privity of contract between the principal and the third party. The broker cannot sell in his own name nor can he sue on the contract. A commission agent, on the other hand, to whom goods are entrusted by sellers with full authority to transfer property and title in the goods to buyers who obtain delivery from the commission agents themselves without even being aware of the identity of the seller principals, is not like a broker. He has, almost invariably,

custody or possession of the goods, actually or constructively. He often sells in his own name and in certain circumstances can sue the buyer himself. A commission agent is not bound to keep separate accounts at his bankers, for he is not a fiduciary agent and the monies he receives are his own; and by the custom of the trade he is only liable as debtor to his employer for the amounts received. In spite of the parties supposing their relationship to be that of principal and agent, in point of law, it may be different.

In the Madras General Sales Tax Act "dealer" is defined as any person who carries on the business of buying or selling goods. "sale" is defined as a transfer of the property in goods by one person to another in the course of trade or business for consideration.

In the case of a commission agent the accepted mercantile practice is that he has control over or possession of the goods and he has the authority from the owner of the goods to pass the property in and title to the goods. If this is so, when a commission agent sells goods belonging to his principal with his authority and consent and without disclosing to the buyer the name of the owner, there is certainly a transfer of property in the goods from the commission agent to the buyer. A business which consists in such transactions can properly be described as a business of selling goods. A similar position would arise even in the case of a commission agent buying for an undisclosed principal. A commission agent doing this kind of business would fall within the definition of "dealer" in the Sales Tax Act. Neither the definition of "dealer" nor of "sale" contemplates as a necessary condition, that the goods sold should belong to the person selling or buying.

I.L.R. 1950 (Mad.) 421, considered and I.L.R. (1951) Mad. 257, distinguished and dissented from.

Accordingly the commision agents in the instant cases would be "dealers" within the meaning of that expression in the Act and liable to tax under section 3 but for the exemption given under section 8. The conditions of the licence are not infringed by the collection of *rusums* and commissions from both sellers and buyers, as the same was a recognised mercantile usage and therefore the commission agents will be entitled to the exemption.

P. Somasundaram and *N. C. V. Ramanujachari* for Appellants and the Government Pleader (*P. Satyanarayana Raju*) for Respondent in Appeal No. 365 of 1947.

N. C. V. Ramanujachari for Appellant and The Government Pleader (*P. Satyanarayana Raju*) and *C. Vasudeva Mannadiar* for Respondents in Appeal No. 447 of 1947.

The Government Pleader (*P. Satyanarayana Raju*) for Appellant and *G. V. Dikshitulu* for Respondents in Appeal No. 641 of 1947.

P. Somasundaram and *M. Nagaramayya* for Appellant and the Government Pleader (*P. Satyanarayana Raju*) and *K. N. Karunakaran* for Respondents in Appeal No. 468 of 1947.

P. Somasundaram and *N. C. V. Ramanujachari* for Appellant and the Government Pleader and *K. N. Karunakaran* for Respondent in Appeal No. 551 of 1947.

The Advocate-General (*V. K. Thiruvenkatachari*) appeared with the Government Pleader in all the cases.

K.S. *Appeals allowed.*

Subba Rao, J. Swaminatha Chettiar *v.* Megalingam Chettiar.
29th November, 1951. S. A. No. 1058 of 1948.

Partnership—Suit for dissolution—Interest—If and when can be allowed from date of suit—Practice—Costs—Appellate Court—When will interfere.

Though the ordinary rule in a suit for dissolution of partnership is to award interest only from the date when the amount due from the one to the other is ascertained, in a case where the suit is for an account in respect of a dissolved partnership, interest may be given even from the date of the filing of the plaint, if the circumstances in that case establish that the other partner was in possession of the assets or utilised them for the purposes of his business or was otherwise guilty of laches.

The appellate Court will not interfere with an order for costs unless the order of the subordinate Court is contrary to any well recognised principle of law.

R. Gopalaswami Aiyangar for Appellant.

T. K. Subramania Pillai for Respondent.

K.S. ——— *Appeal dismissed.*

Basheer Ahmad Sayeed, J. Lakshmana Prasad and sons *v.* Achuthan Nair.
4th December, 1951. C. C. C. A. No. 10 of 1950.

Contract Act (IX of 1872), section 72—Money paid under mistake—Right to recover—Purchaser of motor car paying amount in excess of controlled price believing it to be the controlled price—Right to recover difference in price.

A contract for purchase of a motor car from a dealer must be deemed to be to sell the vehicle at the controlled price because the vendors were not expected to commit an offence by selling it at a price other than the controlled price. When it was later on discovered that the transaction had taken place actually not on the basis of the controlled price but on something different therefrom certainly the vendors would be bound to return the difference in the price which they had received in excess of the controlled price.

K. Bashyam Aiyangar and *P. V. Subramaniam* for Appellant.

K. P. Raman Menon for Respondent.

K.S. ——— *Appeal dismissed.*

Govinda Menon, J. Abdul Kadir Haji *v.* Muhammad.
10th December, 1951. S. A. No. 1231 of 1948.

Malabar Compensation for Tenants Improvements Act (I of 1900), sections 10 and 15—Cashew-nut trees—If fruit bearing or timber trees for computing compensation.

The enumeration of fruit bearing trees in section 15 of the Malabar Compensation for Tenants Improvements Act is not exhaustive because in addition to the various kinds of trees mentioned in it there are other trees which are fruit bearing trees and which add to the value of the holding. Accordingly cashew-nut trees can come under the definition of fruit bearing trees, and though it might be that no table showing the method of valuation of cashew-nut trees has been prepared under section 15 of the Malabar Compensation for Tenants Improvements Act, that would not exclude the possibility of the trees other than the three categories mentioned in the section from being fruit bearing trees. Section 13 does not apply to cashew-nut trees which must be valued as fruit bearing trees.

M. K. Nambiar and *M. Sekhara Menon* for Appellant.

N. R. Sesha Aiyar for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

NRC

Satyanarayana Rao, J. Arunachala Chettiar *v.* Vadla Koundan.
10th December, 1951. S. A. No. 1432 of 1948.

Execution—Sale—Death of defendant—Confirmation of sale without impleading legal representative—Effect.

The order confirming a sale in execution has a double operation of divesting the judgment-debtor of his title in the property and vesting it retrospectively in the auction-purchaser to take effect from the date of the sale. But where the confirmation is made after the death of the judgment-debtor without bringing his legal representatives on record, the confirmation made behind their back is a nullity and must be set aside. But the sale itself must stand and cannot be set aside.

A.I.R. 1929 Oudh 235 *dissented from.*

M. S. Venkatarama Aiyar for Appellant.

K. S. Desikan and *K. Raman* for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

Basheer Ahmed Sayeed, J. Paramasivam Pillai *v.* Adilakshmi Ammal.
13th December, 1951. C. R. P. No. 576 of 1951.

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 10—*Third party claiming items of property in a suit for partition of joint family properties—If can be impleaded as party defendant.*

A third party claiming certain items of property in a suit for partition can be properly added as party defendant in a suit for partition of joint family properties on the application of such third party (claiming to be the real owner of those items) under Order 1, rule 10, Civil Procedure Code.

K. V. Ramachandra Aiyar for Petitioner.

G. R. Jagadisan for Respondent.

K.S. ——— *Petition dismissed.*

Mack and Somasundaram, JJ. Venkayya, *In re.*
8th January, 1952. Cr. R. C. No. 1483 of 1950.
Cr. R. P. No. 1407 of 1950.

Madras Maintenance of Public Order Act (*XXIII of* 1949), *section* 2-A (1)—*Daughter living separately in the same house as her father—Her husband for whose arrest a warrant was pending found in the house—Father if can be convicted for harbouring the wanted man.*

Where it is shown that the daughter of *V* was married to *X* (for whose arrest a warrant had been issued) and was living separately in the same house as *V* and was having separate cooking, *V* cannot be convicted for harbouring *X* who was arrested in the house especially when *V* was not even in the house when the arrest was made. Section 2-A (1) (3) of the Act specifically saves the husband or the wife from the penal orbit of section 2-A (1). It cannot be said that guilt of *V* was proved beyond all reasonable doubt.

Quaere.—Whether the section 2-A (1) contravenes Article 20 (1) of the Constitution.

A. Ramachandran and *P. Rama Rao* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. ——— *Petition allowed.*

Ramaswami, J. Narayana Reddiar *v.* Periaswami Odayar.
10th January, 1952. Cr. R. C. Nos. 1352 to 1355 of 1950.
Cr. R. P. Nos. 1278 to 1281 of 1950.

Penal Code (*XLV of* 1860), *section* 182—*Bribe-giver not sticking to previous statement—Prosecution for—Sustainability.*

Law deals with the bribe-givers and bribe-takers on the same par and treats them as accomplices of each other. Where it is not shown that the previous statements by bribe-givers were false or true and when those persons were not bound to incriminate themselves a prosecution against them for tergiversation (namely that they have not stuck to their previous statement) is misconceived.

G. Gopalaswami for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K.S. ——— *Convictions set aside.*

Subba Rao, J. Thathathiri Mudaliar *v.* The State of Madras.
10th January, 1952. W. P. No. 684 of 1951.

Motor Vehicles Act (IV of 1939), *section* 64-A—*Scope—Power of State Government to call for the records of any order passed—If discretionary or compulsory.*

It cannot be said that under section 64-A of the Motor Vehicles Act the discretion of the State Government (of its own motion or on an application made to it to call for the records of any order passed or proceedings taken by any authority or officer subordinate to it, for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceeding and making such order in reference thereto as it thinks fit) is coupled with duty and that the word "may" should be construed as "shall." Though in some circumstances the word "may" has been construed as "shall", in this case the word "may" means only "may." The Government is given discretion to call for the records for the purpose mentioned in the section. Unless the records are scrutinised and examined by it, the Government cannot set aside an order. But the section does not compel the Government to call for the records even if a frivolous application is filed. Accordingly, the Government will be within their rights to dismiss a revision petition if it is not satisfied that a *prima facie* case has been made out. But it has no power under section 64-A to set aside an order without calling for the records and examining them.

Miss Perween Amiruddin for Petitioner.

V. P. Sarathy for the Advocate-General (*V. K. Thiruvenkatachari*) for the Government Pleader (*P. Satyanarayana Raju*) on behalf of the State and *S. Swaminathan* for 4th Respondent.

K.S. *Application dismissed.*

Mack and *Somasundaram, JJ.* Thimmaraya Goundan, *In re.*
17th January, 1952. R. T. No. 59 of 1951.
(Crl. App. No. 500 of 1951).

Penal Code (XLV of 1860), *section* 302—*Murder of woman by paramour on account of her infidelity—If legally extenuating circumstance justifying lesser sentence.*

Where her paramour murders under powerful sexual emotion a woman on account of her infidelity to him, it will not fall into the category of "legally extenuating" circumstance which would justify the passing of a lesser sentence. But having regard to the youth of the accused (25 years) and the sacrifices he had made for the worthless and immoral woman with whom he was madly infatuated the Government may consider commuting the sentence to one of transportation for life.

V. N. Srinivasa Rao for Accused.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

K.S. *Sentence confirmed*

Subba Rao, J. Ananthasubramanyam *v.* The Director of Controlled Commodities.
18th January, 1952. Writ Petition No. 428 of 1951.

Iron and Steel (Scrap Control) Order (1943), *Clause* 5-*A—Scope—Order under—If can be issued in respect of scrap acquired from a source other than controlled one.*

Under clause 3 of the Iron and Steel (Scrap Control) Order 1943, the scrap can be acquired (1) by a producer under the authority of and in accordance with the conditions contained or incorporated in a written order of the Controller; and (2) any person other than a producer can acquire the same from a controlled source under the authority of and in accordance with the conditions contained or incorporated in a written order of the controller. All other modes of acquisition of the scrap will not be in accordance with the provisions of the clause. Such acquisition may be by one or other of the following modes :—

(*a*) A producer may acquire any scrap without the written authority of the controller.

(*b*) Any person may acquire from a controlled source without such authority; and

(*c*) Any person may also acquire from a source other than a controlled source.

Under clause 5-A if a person acquires in any of the aforesaid modes, which is not in accordance with the provisions of clause 3 the controller is empowered to issue an order directing him to sell the whole, or any part, of the stock, to such person or class of persons and on such terms and conditions as may be specified in the order. The Iron and Steel (Scrap Control) Order 1943, was presumably issued to control, regulate and equitably distribute scrap iron.

Where it is found that some scrap iron has been consigned under a bogus name from Royapuram to the consignee at Kurnool after being presumably clandestinely obtained in Madras, the Director of Controlled Commodities can call upon the consignee to report to him the detailed specification of the total stock of material available with him and to supply the said stocks to persons in whose favour permits would be issued by him for acquiring at controlled rates. It is not open to such a person having the stock to contend that the stock was acquired from any other than controlled source and that the controller could not make an order under clause 5-A of the order.

K. S. Ramamurthi and *K. Vaitheeswaran* for Petitioner.

Vepa P. Sarathi for the Advocate-General (*V. K. Thiruvenkatachari*) for the Government Pleader (*P. Satyanarayana Raju*) for Respondents.

K.S. ——— *Petition dismissed.*

Ramaswami, J.
23rd January, 1952.

Saravana Pillai, *In re.*
Cr. R. C. No. 101 of 1951.
Cr. R. P. No. 100 of 1951.

Criminal Trial—Compromise resiled by one of the parties and denied—Magistrate's power to enquire into the factum of compromise.

When a compromise has been entered into between the parties and which is later resiled by one of the parties and denied, it is open to the Magistrate to enquire into the factum of compromise. I.L.R. 39 Mad. 946; I.L.R. 41 Mad. 685; 148 L.J. 292; 168 L.J. 81 and 45 M.L.J. 544, *relied on.*

V. Venkatesan for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K.S. ——— *Order set aside.*

Ramaswami, J.
25th January, 1952.

Devanugraham, *In re.*
Cr. R. C. No. 525 of 1951.
Cr. R. P. No. 520 of 1951.

Criminal Procedure Code (*V of* 1898), *section* 403—*Second trial when barred—Constitution of India* (1950)—*Article* 20 (2)—*If prohibits such second trial.*

Where the sanction or complaint by a particular person or authority is necessary under the law for the trial of a person, in the absence of such sanction or complaint a Court which tries him is not a Court of competent jurisdiction and where a conviction after such trial is set aside on appeal it will not operate as a bar to the institution of a fresh prosecution against the accused for the same offence on the same facts as in the former prosecution after rectifying the defect of absence of sanction. Even though in the appeal on prior conviction the word "acquittal" is used it must be construed as a "discharge" and will not bar a second prosecution. Clause (2) of Article 20 of the Constitution of India, 1950, uses the conjunction "and" and not the disjunction "or" between the words "prosecuted" and "punished" and this makes it clear that to bar a fresh prosecution for the same offence, the accused should have been both prosecuted and punished. So when an accused is discharged for want of sanction there is no punishment and when a man is punished departmentally there is no prosecution. Therefore, Article 20 (2) of the Constitution of India does not take away the right to institute a second prosecution when the first is found to be a nullity by reason of want of sanction—a prerequisite for the maintaining a prosecution.

V. Rajagopalachari and *R. V. Raghavan* for Petitioner.

The State Prosecutor (*V. T. Rangaswami* Ayyangar) on behalf of the State.

K.S. ——— *Petition dismissed.*

Govinda Menon and *Chandra Reddi, JJ.* Satyanarayanamurthi *v.* Gopalarao Naidu.
23rd November, 1951. Appeal No. 321 of 1947.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 56—*Scope—If bars jurisdiction of Civil Courts to decide questions already pending before them.*

Section 56 of Madras Estates Abolition Act has not the effect of depriving Civil Courts of their jurisdiction to decide questions relating to occupancy rights in respect of a holding in an estate, already pending before them.

P. Somasundaram and *S. Ramamurthi* for Appellants.

T. Venkatadri, U. Sethumadhava Rao, N. V. B Sankara Rao, R. Venkatasubba Rao and *P. Ramachandra Rao* for Respondents.

K.S. ——— *Appeal dismissed.*

Govinda Menon, J. Kandaswamy Nadar *v.* Province of Madras.
4th December, 1951. S. A. No. 1114 of 1948.

Madras Survey and Boundaries Act (VIII of 1923), *sections* 9, 11, 13 *and* 14—*Survey without notice to party concerned and adverse to him—Such party not bringing suit to set aside the survey within three years—Survey if binding on party not given notice.*

A party concerned by an adverse survey to whom no notice was given of the survey is not bound to file a suit within three years to set aside the order of the Survey Officer because he had no notice of the survey and the orders on it cannot be said to be correctly passed under section 13 of the Madras Survey and Boundaries Act and binding on that party.

T. V. Balakrishnan for Appellant.

The Government Pleader (*P. Satyanarayana Raju*), *Srinivasan* and *K. Kuttikrishna Menon* for Respondents.

K.S. ——— *Appeal allowed. Leave refused.*

Panchapakesa Ayyar, J. Karthiayani Amma *v.* Chathukutty Nambiar.
5th December, 1951. S. A. No. 1167 of 1948.

Malabar Law—Marumakkathayam—Bequest to wife and children excluding children by any future husband or husbands—Property if not tavazhi.

There is nothing in any ruling of this Court or of the Privy Council or Federal Court or Supreme Court, making it obligatory for a *Marumakkathayam* husband gifting or bequeathing or settling property on his wife and children to provide for the children of his wife by any imaginary future husband or husbands, after his death, divorce or abandonment. The bequeathed or gifted property will not cease to be *tavazhi* property in such a case and the donees will not take such property as tenants-in-common equally. I.L.R. 51 Mad. 574; I.L.R. 16 Mad. 201, referred to.

A. Achuthan Nambiar for Appellant.

O. T. G. Nambiar for Respondent.

K.S. ——— *Appeal allowed. Leave refused.*

Chandra Reddi and *Ramaswami, JJ.* Ramireddi *v.* Bichalu.
13th December, 1951. S. A. No. 2510 of 1947.

Res judicata—*Judgment rendered in earlier suit under Order* 21, *rule* 63, *Civil Procedure Code to which the claimant, the decree-holder and judgment-debtors were impleaded—If* res judicata *in subsequent suit between claimant and a representative in interest of the judgment-debtor.*

A judgment rendered in an earlier suit filed under Order 21, rule 63, of the Code of Civil Procedure, to which the claimant, the decree-holder, and judgment-debtors were impleaded as parties will operate as *res judicata* in a subsequent suit between the claimant and a representative in interest of the judgment-debtor.

(Case-law discussed).

P. Satyanarayana Raju and *M. B. Rama Sarma* for Appellants.

Ch. Suryanarayana Rao for Respondents.

K.S. ——— *Appeal allowed.*

Ramaswami, J. Public Prosecutor, Madras *v.* Hanumanthu.
9th January, 1952. Crl. Appeal No. 880 of 1951.

Criminal trial—Charge of "prohibition offence"—Evidence of prohibition officers who had investigated and put up case for trial—If can be disbelieved as interested evidence.

The fact that prohibition officers do their statutory duty (investigate cases) and put up cases for trial does not mean that they are interested in securing conviction by hook or crook and by uttering falsehoods. Whether a particular prosecutor or officer in the circumstances of the case can be believed or not has to be decided on its own merit in each case.

The Public Prosecutor (*V. T. Rangaswamy Aiyangar*) in person.

Notice to accused not given.

K.S. ——— *Appeal dismissed.*

Ramaswami, J. Appayya, *In re.*
17th January, 1952. Crl. R. C. No. 1019 of 1950, etc.
(Crl. R. P. No. 952, etc., of 1950).

Companies Act (VII of 1913), section 134—Managing director and other directors—Liability for not filing the first balance-sheet within 18 months of incorporation of company——Non-holding of general body meeting within that period—If a good defence.

It is not open to a managing director of a company to plead in answer to a charge under section 134 of the Companies Act of failure to file the first balance-sheet within 18 months of incorporation of the company his prior default in respect of the calling of the prescribed general meeting. It cannot be contended that as no general body meeting had been held within the period no offence has been committed of failing to file a balance-sheet as required by section 134.

I.L.R. 45 Cal. 486, relied on. A.I.R. 1948 Bom. 351 disapproved; (1941) 1 M.L.J. 419, referred to.

The other directors also are liable and cannot plead their inability or helplessness to call a general body meeting.

A.I.R. 1948 Cal. 42, relied on.

C. V. Dikshitulu and *N. Rajeswara Rao* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. ——— *Petitions dismissed.*

Mack and Somasundaram, JJ. Chalapatrao Patnaik, *In re.*
28th January, 1952. R. T. No. 62 of 1931.
(Crl. A. No. 452 of 1951.)

Madras Police Standing Order No. 157, based on G. O. No. 1098 dated 9th July, 1912, as modified by G. O. No. 2744 dated 15th July, 1929 and G. O. No. 1186 dated 21st March, 1942.—Scope and expediency of—Applicability to murder, etc., of person who is not in police custody.

Police Standing Order No. 157 is based on G. O. No. 1098 dated 9th July, 1912, as modified by two subsequent G. O.s, Nos. 2744 dated 15th July, 1929 and No. 1186 dated 21st March, 1942. Under that Order as it stands, there is a duty cast on Sub-Divisional Magistrates to investigate all offences of torture or causing death or grievous hurt alleged against Police personnel, whether within the scope of their official duties or in their private capacity. According to the Standing Order there is no objection to a Police Officer being associated with such an enquiry at the Sub-Divisional Magistrate's invitation, but there should be no preliminary enquiry by the Police and any information gathered by a Gazetted Police Officer should at once be reported to the Sub-Divisional Magistrate. The Standing Order is really an extension of section 176 (1), Criminal Procedure Code, to all offences alleged to have been committed by Police Officers, such as murder, torture or grievous hurt under any circumstances. The legality of the Standing Order, in so far as cases other than death in Police custody is concerned, is rested on section 159, Criminal Procedure Code, under which a Magistrate, on receving

a report under section 157, Criminal Procedure Code, may direct an investigation or hold a preliminary enquiry into the case himself at once. The holding of an enquiry or investigation by a Magistrate, independently in certain cases, shutting out a police investigation altogether, cannot be said to be illegal. The legality of the Standing Order cannot be raised in question on the ground that a Magistrate has no statutory power to hold an enquiry or himself cannot conduct an investigation.

Per *Mack, J.*—It is the nature of things extremely difficult and also often impracticable for a Magistrate to investigate a complicated murder case. The class of cases originally contemplated by the G. O. of 1912 related to torture, murder and grievous hurt committed on persons while in Police custody, where the range of enquiry and investigation is really limited both in space and time. But it is impracticable to cast on Magistrates the responsibility and burden of investigating all cases of murder and grievous hurt committed by Police Officers even on persons, who are not in Police custody. The Standing Order rests on the basis of distrust against the Police where one of the police personnel is alleged to have committed an offence. Only cases of grievous hurt or death caused by Police Officers in their public capacity should be enquired by a Magistrate, but offences committed by a Police Officer in his private capacity should be investigated only by a superior Officer of the Police. To enable the Police department to win the confidence of the public it is first necessary to remove the basis of distrust.

Per *Somasundaram, J.*—There may be cases where, the offence may, at first sight, appear to have been committed by the Police Officer in his public capacity, but during the course of the investigation may turn out to be one committed purely out of private grudge in his private capacity, or the converse cases also may arise. Considering these circumstances it is better to leave Police Standing Order No. 157 as it is for some more time. Prejudice against police is bound to wear out in course of time in independent India particularly when the people and the police begin to realise that the servants of Government are the servants of the people. Then there will be no need for the Police Standing Order No. 157 or for the retention of sections 25 and 26 of the Evidence Act or section 162 of the Code of Criminal Procedure.

P. Basi Reddi and *P. Ramachandra Reddi* for Appellant.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K.S. — *Accused acquitted.*

Mack and *Somasundaram, JJ.* — Thukkudu alias Perumal, *In re.*

28th January, 1952. — R. T. No. 75 of 1951.

Evidence Act (I of 1872), section 30—Scope and applicability—Confession of co-accused—Admissibility and weight of as against other accused.

Per Mack, J.—Section 30 of the Evidence Act, was intended to relieve judges and juries from an attempt to perform an intellectual impossibility by asking them to exclude altogether from their minds a confession by one accused implicating other accused along with him, which to be rendered intelligible has to be read out *in toto* when they consider the case of the other accused. The whole confession has to be brought to their notice and section 30 has been specially enacted to make such a confession admissible both against the confessor and his co-accused and places this material exactly on the same footing as regards admissibility as other evidence, the weight of which must vary with its nature and quality. The weight to be attached to the confession of a co-accused is an entirely different matter and must depend upon the facts of each case—in the majority of cases, it is very little if not negligible. The confession of a co-accused can be used only in support of other evidence and should not be made the foundation of a conviction.

Per *Somasundaram, J*: As it is not necessary to invoke section 30 of the Evidence Act in the case, a consideration of that section does not arise. In the circumstances, any expression of opinion about section 30 of the Evidence Act becomes *obiter*. I shall therefore refrain from expressing my views on section 30 of the Evidence Act.

L. J. A. Menezes, Miss Nasreen Aminuddin and *Y. Ram Reddi* amicus curiæ for Accused.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

K.S. ——— *Appeal dismissed.*

Subba Rao, J.
31st January, 1952.

Rangaswamy Raja *v.* The State of Madras.
W. P. No. 806 of 1951.

Motor Vehicles Act (IV of 1939), *section* 64-A—*Exercise of jurisdiction under—Scope.*

Under section 64-A of th Motor Vehicles Act the Government could exercise the jurisdiction either *suo motu* or on application filed before it, and in exercise of the jurisdiction if it came to the conclusion that the order of any subordinate authority was improper, irregular or illegal, it could set aside that order and pass such order which might be appropriate to the circumstances. The mere fact that a revision petition was pending against the order of the Central Road Traffic Board would not deprive the Government of the jurisdiction which it undoubtedly possessed under section 64-A. It may be that the pendency of such petition was the occasion for its calling for the records of the subordinate authorities, but after going through the records when it found that the order of the Regional Transport Authority was bad it can validly set aside such order.

M. K. Nambiar and *N. G. Krishnan Ayyangar* for Petitioner.

V. P. Sarathy for the Advocate-General, (*V. K. Thiruvenkatachari*) for the Government pleader (*P. Satyanarayana Raju*) on behalf of the first Respondent.

N. Rajagopala Ayyangar for second Respondent.

K.S. ——— *Application dismissed.*

Venkatarama Ayyar, J.
1st February, 1952.

Pallavam Pillai *v.* Ganapathy Ayyar.
S. A. No. 922 of 1947.

Public pathway—Right of members of public to take processions including funeral processions.

Members of the public have a right to take processions through public streets and pathways whether the processions be religious or social or political. No distinction can be made between religious processions and funeral processions. But such user must be reasonable and it would be subject to all the limitations to which all processions on the public streets are subject. *Authorities discussed.*

K. S. Desikan for Appellants.

S. V. Rama Aiyangar for Respondent.

K.S. ——— *Appeal allowed. Leave refused.*

Ramaswami, J.
6th February, 1952.

Sakuntala Bai *v.* Venkatakrishna Reddi.
Cr. R. C. No. 107 of 1951.
(Cr. R. P. No. 106 of 1951).

Sea Customs Act (VIII of 1878), *section* 198—*Customs Inspector abusing and assaulting person suspected of smuggling—Prosecution for—Accused if can say that it was an official act and a month's previous notice under section* 198 *was necessary—Criminal Procedure Code (V of* 1898), *section* 197—*Sanction of Central Government if essential for prosecution.*

It is no part of the duty of a Customs Inspector to lose his temper and abuse and assault a person suspected of smuggling who refuses to remove the gold ornaments worn by her. Such acts cannot be said to have been done or purported to be done in the discharge of official duties. Accordingly a month's previous notice to the accused is not necessary for the prosecution of the Customs Inspector. Such a prosecution does not require sanction under section 197, Criminal Procedure Code. Assuming such sanction is necessary, the sanction of the Central Government is not necessary because the Customs Inspector is removable by a delegated authority.

T. R. Srinivasan for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K.S. ——— *Petition allowed and discharge of accused set aside.*

Subba Rao, J. Janakiramayya *v.* Ranganayakamma.
29th November, 1951. C. R. P. No. 1326 of 1950.

Madras Agriculturists Relief Act (IV of 1938), *section* 4 (h)—*Debt "due" to a woman as life estate holder—If exempted under section* 4 (h) *of the Act.*

A debt is certainly payable to the life estate holder and she can claim to recover it as of right. She can file a suit and recover the amount. It is not open to the debtor to raise the plea that there is an outstanding vested remainder and therefore the entire debt is not due to the life estate holder. Where such debt is due to a life estate holder who is a woman on 1st October, 1937, if it did not exceed Rs. 6,000, it is not liable to scaling down under Madras Act IV of 1938. The value of her property for the purpose of exemption is the value only of her life interest in the property and if the value of such life estate does not exceed Rs. 6,000 the debt is not liable to be scaled down.

V. Subramanya and *M. Ramakrishna* for Petitioner.

K. Kotiah for Respondent.

K.S. *Petition dismissed.*

Satyanarayana Rao and *Rajagopalan, JJ.* The Municipal Council of Madurai *v.* The State of Madras.
13th December, 1951. C. M. P. Nos. 6517, etc. of 1951.

Madras Electricity Supply Undertakings (Acquisition) Act (XLIII of 1949)—*Contravenes Article* 14 *of the Constitution so far as it relates to local bodies and therefore* ultra vires.

The Madras Electricity Supply Undertakings (Acquisition) Act (XLIII of 1949) in so far as it relates to local authorities contravenes Article 14 of the Constitution of India, and therefore is *ultra vires*. An order acquiring undertakings belonging to local bodies cannot be upheld as valid.

As the questions raised relate to the interpretation of the Constitution and the Government of India Act, 1935, certificates under Article 132 of the Constitution that the cases are fit for appeal to the Supreme Court were granted.

M. K. Nambiar and *P. S. Kailasam* for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) instructed by the State Counsel (*John and Row*) on behalf of the State.

K.S. *Petitions allowed.*

Satyanarayana Rao and *Rajagopalan, JJ.* Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt *v.* Commissioner, H. R. E. Board, Madras.
13th December, 1951. C.M.P. No. 2591 of 1951 & W.P. Nos. 379 and 380 of 1951.

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *sections* 20, 21, 25 (4), 26, 29, 30 (2), 31, 53, 54, 55 (2), 56, 58 (3), 59, 63 to 69, 70 (2), (3) and (4), 76, 89 and 90—*Are* ultra vires *the Madras State Legislature.*

Sections 20, 21, 25 (4), 26 (to the extent section 25 (4) is made applicable), section 28 (though it sounds innocuous, it is liable to abuse) sections 29, 30 (2), 31 (because Courts have ample powers to meet these contingencies) sections 54, 55 (2), 56, 58 (3), 59, 63 to 69 in chapter VI, section 70 (2), (3) and (4), section 76, section 89 and section 90 (to the extent it gives the Government virtually complete control over the Matathipathis and Mutts) are *ultra vires* the Madras State Legislature in so far as they relate to maths.

The sections of Madras Act II of 1927 which correspond to the sections of the new Act enumerated above as being *ultra vires* will also be *ultra vires*. Since section 5 of the New Act has repealed the earlier Act II of 1927 it is unnecessary to go into detail in examining which of the provisions of the earlier Act were *ultra vires* the State Legislature tested by the fundamental rights guaranteed by the Constitution of India, 1950.

The incidents and nature of Maths and Matathipathis discussed elaborately.

C.M.P. No. 2591 of 1951:

K. Bhashyam, T. Krishna Rao, K. R. Karanth and *S. Venkatakrishnan* for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*), *M. Seshachalapathi* and *T. K. Rama Nambisan* for Respondents.

W.P.Nos. 379 and 380 of 1951 :

K. Umameswaram, Alladi Kuppuswami and *C. V. Srinivasachari* for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) with the Government Pleader (*P. Satyanarayana Raju*) for Respondent.

K.S. — *Rule* Nisi *made absolute. Certified that it is a fit case for appeal to Supreme Court.*

Subba Rao, J. — Krishnan Nambiar *v.* The State of Madras.
22nd January, 1952. — W.P. No. 655 of 1951.

Prevention of Cruelty to Animals Act (*XI of* 1890)—*Government grants to a society for prevention of cruelty to animals of amounts equal to fines realised in cases charged by agents of society—Stopping of by Government—Not a judicial act which can be interfered with by a writ.*

Payments of grants made by the Government to a society for prevention of cruelty to animals of amounts equal to fines realised in cases charged by agents of such society are only *ex gratia* payments to which the society has no manner of right. Stopping such payments does not affect the rights of parties nor does the Prevention of Cruelty to Animals Act or any other provision of law impose a duty on the Government to act judicially in withdrawing such payments. Order of Government withdrawing such grant or the police powers conferred on agents of such societies is not a judicial act. The conferring of police powers on the agents of the society, or the withdrawal of the same does not affect the rights of the subjects. In such a case an application for issuing a writ of *certiorari* for quashing the order of the Government is not maintainable.

A. Achuthan Nambiar for Petitioner.

V. P. Sarathi for The Advocate-General (*V. K. Thiruvenkatachari*) on behalf of the Respondent.

K.S. — *Petition dismissed.*

Mack and Somasundaram, JJ. — Balan, *In re.*
12th February, 1952. — R. T. No. 87 of 1951.
(Cr. A. No. 620 of 1951.)

Constitution of India (1950), *Part III—Fundamental rights—If includes right to use foreign flags on Indian soil.*

Per *Mack, J.*—The Constitution nowhere contemplates a divided allegiance or loyalty to the Constitution and the flag of the Indian Union and to the flag of any other foreign State. Merely because neither the Constitution nor any specific legislation forbids the use of the flags of foreign nations on Indian soil, they can in no sense be permitted to be so used in accordance with any fundamental right laid down in the Constitution. Such user on the contrary would be directed to the undermining of one of the main pillars on which the Constitution is founded. It will be increasingly embarrassing for Judges (who have taken the oath to uphold the Constitution) if they were to permit the free intrusion of foreign flags on the Indian soil for the propagation of any form of political doctrine or economic ideals. If such flags continue to be used by organisations throughout the country there would be no alternative for the Government to introduce legislation making such user an offence punishable compulsorily by substantial imprisonment.

Per *Somasundaram, J.*—" The observations regarding the use of flags are entirely foreign to and beyond the scope of the judgment in this case ".

V. Venkatraman for *Row and Reddy* and *Mohan Kumaramangalam* for Appellant.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

K.S. — *Sentence of death confirmed.*

Subba Rao, J.
14th November, 1951.

Natesa Mudaliar *v.* Secretary, Regional Transport Authority.
W.P. No. 351 of 1951.

Madras Motor Vehicles Rules, rule 136 *(as amended)—Limitation for filing appea within* 30 *days from date of despatch of order of secretary—Validity.*

The part of rule 136 of the Madras Motor Vehicles Rules prescribing the period of limitation from the date of despatch of the order is invalid. That rule is unreasonable and contrary to the principles of natural justice and works great hardship in certain circumstances. An appeal filed within 30 days from the date of the receipt of the order by the appellant must be held to be in time.

M. Natesan for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) on behalf of the Respondents.

K.S. *Petition allowed.*

Subba Rao, J.
9th January, 1952.

Kumaraswami Padayachi *v.* Govindaswami Padayachi.
A.A.A.O. No. 18 of 1950.

Madras Agriculturists Relief Act (*IV of* 1938)), *section* 9-*A—Applicability when mortgagee is in possession in pursuance of clause in mortgage that if debt is not redeemed within five years mortgagee was to become owner.*

Where in pursuance of a clause in a mortgage that if the mortgage debt is not redeemed within five years that mortgagee was to become owner the mortgagee claimed that he was in possession as vendee after the expiry of the five years, it must be held that the clause was a clog on the equity of redemption and that the possession of the creditor was only as mortgagee and therefore section 9-A of the Agriculturists Relief Act applied directly to the case and the mortgagor is entitled to redeem accordingly. The mortgagee's *animus* is not the decisive factor for the application of the provisions of section 9-A.

T. S. Krishnamurthi Aiyar for Appellant.

T. S. Kuppuswami Aiyar for Respondent.

K.S. *Appeal dismissed. Leave refused.*

Mack and Somasundaram, JJ.
4th February, 1952.

Rajarama Reddi, *In re.*
Cr. M. P. No. 2321 of 1950.

Constitution of India (1950), *Article* 228—*Petition under—Procedure.*

Where an entire Act is called in question as *ultra vires*, there is no obligation on the State Prosecutor on the criminal side to file an affidavit at all seeking to uphold its validity; the onus is on the petitioner to satisfy the High Court under Article 228 that there was a substantial question of law as to the interpretation of the Constitution, in other words, that the Act can for some *prima facie* substantial reasons be challenged in a Court of law.

V. V. Srinivasa Aiyangar, M. K. Nambiar and *V. Devarajan* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. *Petition dismissed.*

Mack and Somasundaram, JJ.
6th February, 1952.

Mara Naicken, *In re.*
R.T. No. 73 of 1951.
Cr. A. Nos. 491 and 492 of 1951.

Criminal Procedure Code (V of 1898), section 164—Scope and effect—Confession made to Magistrate—Essentials for admissibility in evidence—Confession by person voluntarily surrendering to warrant and expressing desire to make confession—Procedure.

Per *Mack, J.*—If an accused person surrenders to a warrant voluntarily and desires to make a confession, it is the duty of the Sub-Magistrate to proceed immediately under the provisions of section 164, Criminal Procedure Code and after giving him the necessary warnings, record what he wishes to say as soon as possible, before he falls in any way under police influence. The precaution of giving an accused person time to reflect is intended to protect persons, who are produced from police custody before Magistrates for the recording of confessions, and it is just and proper that they should be given time for reflection on removal altogether from any police influence before confessions, which can be used in evidence against them, are recorded. This precaution is not normally necessary in the case of persons, who voluntarily appear before a Magistrate and express their desire to make confessions. But as the difference of opinion on this point expressed by the other Judge Somasundaram, J., would otherwise increase the present uncertainty it must be resolved by reference to a Full Bench although it does not affect the final decision in the instant case.

Per *Somasundaram, J.*—The observations that a Magistrate can record a confession from an accused who comes to him even before the investigation starts does not arise in this case and are purely obiter. The Magistrate can function only under section 164 if he is to record a confession but where section 164 does not apply he cannot record any confession. The powers of a Magistrate are given in Schedule III of the Code of Criminal Procedure. The Magistrates have no other power than what is granted to them under this Schedule. What is not granted to them they cannot do. So confession made before Magistrates even before the investigation begins, will not be admissible.

P. S. Kailasam for Appellant.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. ———— *Sentence varied.*

Govinda Menon and Krishnaswami Nayudu, JJ.
14th February, 1952.

Ramachandrudu *v.* Gulabchand Firm.
A. A. O. Nos. 212 and 337 of 1951.

Civil Procedure Code (V of 1908), sections 46 and 47—Order extending time for a precept to keep in attachment properties belonging to judgment-debtor—Not appealable.

An order directing a preceptor extending time for a precept to keep in attachment properties belonging to the judgment-debtor is not one relating to execution, discharge or satisfaction of the decree.

G. Balaparameswari Rao for Appellant.
P. V. Vallabhacharyulu for Respondents.

K.S. ———— *Appeals dismissed.*

Subba Rao, J.
15th February, 1952.

Bhagat Estates *v.* Accommodation Controller, Madras.
W. P. No. 805 of 1951.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 3—Objection taken by house owner that rent of premises does not exceed Rs. 25 per month—Accommodation Controller must decide whether rent is more than Rs. 25 before exercising jurisdiction and demanding possession.

When a landlord after giving notice of vacancy takes the objection that the rent of the premises in question does not exceed Rs. 25 per month and that therefore the Accommodation Controller has no jurisdiction to demand possession of the house, the Accommodation Controller must first find on the materials furnished whether the rent exceeds Rs. 25 per month before he can exercise his jurisdiction

M. A. Ghatala and *C. Narasimhacharyulu* for Petitioner.

V. P. Sarathi for the Government Pleader (*P. Satyanarayana Raju*) for Respondent.

K.S. ——— *Petition allowed.*

Subba Rao, J. Rangamannar Chetty *v.* Rangiah.
15th February, 1952. C.M.P. No. 6445 of 1951.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (2) (*ii*) —*Sub-letting which entails evictions—Essentials.*

There cannot be a sub-letting, unless the lessee parted with legal possession. The mere fact that another is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. To create a lease or sub-lease a right to exclusive possession and enjoyment of the property should be conferred on another. Taking in other partners in his business by a lessee will not constitute sub-leasing and the lessee is not liable to eviction under the provisions of Madras Act XXV of 1949.

K. Umamaheswaram and *A. Subramanian* for Petitioner.

M. S. Ramachandra Rao and *M. Krishna Rao* for Respondents.

K.S. ——— *Application dismissed.*

Subba Rao, J. Sambasiva Reddy *v.* Central Road
18th February, 1952. Traffic Board, Madras.
W.P. No. 686 of 1951.

Motor Vehicles Act (IV of 1939), *section* 64-*A—Appeal to Road Traffic Board without impleading as respondent others whose applications for permit had been rejected—Person not made party—If entitled to writ to quash order in the appeal.*

A person who had not been made a party to an appeal to the Central Road Traffic Board which has made a final order may take appropriate action for getting that order set aside and a writ cannot be issued at the instance of such person who was not a party to the order sought to be quashed.

V. Venkataraman for *Row and Reddi* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) on behalf of the Government and *C. A. Vaidyalingam* and *S. Gopalaratnam* for 2nd Respondent.

K.S. ——— *Application dismissed.*

Rajamannar, C.J. and Venkatarama Ayyar, J. Seshagiri Sarma *v.*
19th February, 1952. State of Madras.
C.M.P. No. 4360 of 1951.

Madras Hereditary Village Offices Act (III of 1895)—*Order of District Collector setting aside that of Revenue Divisional Officer removing a person and appointing another to discharge duties of the office during minority of holder—Government has no jurisdiction to interfere with it.*

Appointments, dismissals and other matters of and pertaining to the hereditary village officers mentioned in the Madras Hereditary Village Offices Act are governed entirely by the provisions of that Statute. There is no provision in that Act conferring any power on the Government to interfere with the orders of any of the subordinate revenue authorities entrusted with specified powers by the provisions of that Act. Under section 10 (5) of the Act it is the Collector who has got the power to appoint a qualified person to discharge the duties of the office when a minor is registered as heir. Ordinarily, this power is exercised by the Revenue Divisional Officer. This is because of the provisions of the Madras Subordinate Collectors Regulation. The proceedings of Subordinate and Assistant Collectors are made subject in all cases and in the fullest manner to the superintendence, control and revision of the Collector, who shall have power either to direct, generally, that the proceedings of any of his Subordinates or Assistants shall be regularly submitted to himself before the decision, order or sentence is carried into execution, and to confirm, modify or annul them, or issue any further orders in the case, as he may see fit; or in any particular case to direct that the decision, order or sentence of any of his Subordinates or Assistants shall not be carried into execution, and to pass such further orders as he may see fit.

Where there is an order of a Revenue Divisional Officer removing a person and appointing another as the person to discharge the duties of the office during the minority of the registered heir, the order is liable to be revised by the District Collector; and where the District Collector in the exercise of this power set aside the order of the Revenue Divisional Officer and restored the person who was removed to his original position, the order of the District Collector is not subject to any appeal or revision and neither the Board of Revenue nor the Government can interfere with his order. Where the Government interfered and set aside such order it must be quashed and the order of the District Collector restored.

C. Rama Rao and *D. V. Reddi Pantulu* for Petitioner.

T. Venkatadri for 3rd Respondent.

The Advocate-General (*V. K. Thiruvenkatachari*) for the Government Pleader (*P. Satyanarayana Raju*) for 1st and 2nd Respondents.

K.S. *Order quashed.*

Subba Rao, J.
19th February, 1952.

Raja Venkata Ramayya Appa Rao *v.*
Collector of Madras.
C.M.P. No. 6632 of 1951.

Revenue Recovery Act (I of 1890), *sections* 3 *and* 5—*Applicability to recovery of arrears of income-tax.*

Arrears of income-tax is recoverable by the Income-tax Officer but the *process of recovery* is entrusted to the Collector. Therefore as income-tax is recoverable by the Income-tax Officer as land revenue, under section 5 of the Revenue Recovery Act (I of 1890) the Collector of the district in which the office of the Income-tax Officer is situate has power to send a certificate of the amount to be recovered to the Collector of another district.

O. Chinnappa Reddi and *P. Ramakrishna* for Petitioner.

Vepa P. Sarathi for the Government Pleader (*P. Satyanarayana Raju*) on behalf of 1st Respondent.

C. S. Rama Rao Sahib for 2nd Respondent.

K.S. *Application for issue of mandamus dismissed.*

Rajamannar, C.J. and Venkatarama Ayyar, J. Varadachari *v.* State of Madras.
22nd January, 1952. C.M.P. No. 5590 of 1951.

Madras Manure Dealers Licensing Order, 1949—*Government Order providing for enhancement of licence fee from Rs.* 10 *to Rs.* 100 *per expeller in oil mills—Tests of validity—Licence fee and tax—Difference.*

There is a fundamental difference between a tax and a licence fee. The issue of licences to regulate particular branches of business or specified trades or occupations and other matters is part of what in American Constitutional law is called the "police power" of the State. For the grant of a licence a fee may be charged to cover probable expenses which may have to be incurred for the regulation of the particular trade or business or calling in respect of which the licence is required. The licence fee is not intended to raise revenues for the general purposes of the authority levying the fee. For such purposes the levy should be in the shape of a tax. The licence fee must be reasonable whereas a tax need not be.

Under the Madras Manure Dealers Licensing Order there is nothing which directly or indirectly provides for anything other than the regulation of the sale of manure. There is nothing in the order to indicate that the licence required from the dealers is for the purpose of ensuring the proper quality of manure being sold. There is not even a provision which makes a sale of adulterated or unwholesome manure punishable. An enhancement of the licence fee from a flat rate of Rs. 10 to Rs. 100 per expeller in an oil mill cannot be defended on the ground that the licensing authority had to incur expenses for staff to examine the manure and enforce proper quality being supplied. The enhancement in the case of millers only while ordinary dealers had to pay a flat rate of Rs. 20 would in any event be clearly discriminatory and would offend the provisions of Article 14 of the Constitution.

Accordingly the enhanced rates of licence fees under G.O. Ms. No. 2435 (Food and Agriculture), dated 29th December, 1950, published in the *Fort St. George Gazette*, dated 16th January, 1951, is unconstitutional and therefore invalid because it would amount to an unreasonable restriction on the exercise of the right to carry on business guaranteed by the constitution and also because the fee is discriminatory and in contravention of Article 14 of the Constitution.

K. V. Venkatasubramanyam and *Messrs. Row and Reddi* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) for the Government Pleader (*P. Satyanarayana Raju*) on behalf of the Respondent.

K.S. ——— *Application allowed and Rule nisi made absolute.*

Subba Rao, J. Union of India *v.* Nataraja Sastrigal.
13*th February*, 1952. W.P. No. 731 of 1951.

Workmen's Compensation Act (VIII of 1923), *sections* 16 *and* 17—*Single application filed on behalf of a number of employed persons belonging to the same unpaid group—Right of employer to appeal where total amount directed to be paid in such application exceeds Rs.* 300 —*Writ of* certiorari *to quash order not maintainable as there is other remedy.*

As a single application can be filed on behalf of a number of employed persons belonging to the same unpaid group and an employer has the right to appeal to the Court of Small Causes if the amount directed to be paid in such single application exceeds Rs. 300, the employer thus having other adequate remedy by way of appeal to the Court of Small Causes, a writ of *certiorari* to quash the order of the Commissioner cannot issue.

S. S. Ramachandra Ayyar for Petitioner.

R. Desikan for Respondents 1 and 2.

The Government Pleader (*P. Satyanarayana Raju*) on behalf of 3rd Respondent.

K.S. ——— *Application dismissed.*

Subba Rao, J. Subba Rao *v.* Director of Town Planning, Madras.
18*th February*, 1952. W.P. No. 736 of 1951.

Municipality—Establishment Rules, rule 19 (1)—*Scope—Order of abolition of a post mentioning that it should come into force on a specified date—If can be brought into operation*

before expiry of three months after notice has been given to the officer whose services are dispensed with.

Rule 19 (1) of the Establishment Rules reads "unless it contains an express statement to the contrary an order for the abolition of an appointment or for the reduction of the emoluments of an appointment, shall not be brought into operation before the expiry of three months after notice has been given to the officer or servant whose services are to be dispensed with, on such abolition or reduction".

The Town Planning and Building Inspector of the Narasaraopet Municipality who was in Grade III was served a notice on 23rd December, 1950, from the Commissioner of the Narasaraopet Municipality informing him that his services would not be required from 25th January, 1951, as the post of Grade III Building Inspector had been converted into Grade I Inspector by the Inspector of Local Boards. The Inspector whose services were thus terminated applied for a writ of *mandamus* claiming that that abolition of his appointment was illegal as that order was brought into force before the expiry of three months after notice had been given to the petitioner.

Held: As the Inspector of Local Boards specifically stated in his order that his order giving sanction for the conversion of the existing post of Town Planning and Building Inspector Grade III, into that of Grade I, should come into force on 6th December, 1950 (the date of his order) his order contained the express statement that it should come into force immediately and accordingly three months notice for the abolition of the appointment was not necessary and the order cannot be attacked.

P. Rama Rao and *K. V. Raghunatha Reddi* for Petitioner.

V. P. Sarathi for the Government Pleader (*P. Satyanarayana Raju*) on behalf of 1st Respondent.

M. B. Rama Sarma for 2nd Respondent.

K.S. —————— *Application dismissed.*

Rajamannar, C.J. and Venkatarama Ayyar, J.
27th February, 1952.

Rajashri Pictures, Ltd. *v.* Mahalingam.
O.S.A. No. 136 of 1951.

Madras High Court Original Side Rules, Order VII—Suit found to be one for specific performance of an agreement to advance certain amount—Plaintiff if can invoke Order VII of Original Side Rules—Right of defendant to leave to defend.

Where it is found that the suit is in the nature of a suit for specifically enforcing one of the terms of a contract between the parties, *viz.*, a promise to advance a sum of Rs. 22,500 out of which Rs. 7,500 had already been advanced (the said amount to be adjusted against the proceeds of the picture when distributed) Order VII of the Original Side Rules would not govern such suit. The defendant is entitled to raise defences open to one of the parties to a contract when the other party seeks to specifically enforce the contract. Accordingly the defendant is entitled to have leave to defend unconditionally.

D. Suryaprakasa Rao and *A. Satyanarayana Rao* for Appellant.

L. V. Krishnaswami for Respondent.

K.S. —————— *Appeal allowed.*

Ramaswami, J.
3rd March, 1952.

Seetharamayya *v.* Anjayya.
C.R.P. No. 1451 of 1951.

Civil Procedure Code (*V of* 1908), *Order XXXVII, rule* 3—*Leave to defend a summary suit—Existence of triable issue—If sufficient to entitle defendant to grant of unconditional leave to defend.*

It cannot be said that the moment a defendant had raised a triable issue unconditional leave to defend a summary suit should be granted to the defendant. (1949) 2 M.L.J. 70 and other case-law referred to. To entitle a defendant to unconditional leave he should satisfy the Court not only that there was a triable issue but also that his defence was *bona fide*. The only test to be applied is whether the defence raised a real issue and not a sham one.

K. Umamaheswaram and *V. Sethu Madhava Rao* for Petitioner.

P. R. Ramachandra Rao for Respondent.

K.S. —————— *Order varied.*

Subba Rao, J.
29th January, 1952.

Rahimansa Rowther *v.* Madras Islamia Educational Institution.
S. A. No. 1673 of 1948.

Transfer of Property Act (*IV of* 1882, *as amended in* 1929), *sections* 91, 92 *and* 95—*—Scope—Co-mortgagor redeeming mortgage—Rights of the other mortgagor to file suit for redemption.*

The co-mortgagor redeeming is merely an instance of subrogation. The redeeming mortgagor has not merely a charge, but the mortgage, as to his share, is extinguished, and as to the shares of the other mortgagors he stands in the shoes of the mortgagee. Where a co-mortgagor redeems the entire mortgage, his right as a mortgagee relates back to the date of the mortgage which he has redeemed for the benefit of priority over subsequent mortgages. The period of limitation for suit for redeeming by the other mortgagor against the redeeming co-mortgagor is the same as against the mortgagee. I.L.R. 19 Pat. 398 and A.I.R. 1943 Bom. 191, approved. A suit filed within 60 years of an acknowledgment will be in time.

K. Venkataraman for Appellant.

R. Gopalaswami Aiyangar for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Ramaswami, J.
3rd February, 1952.

Deena Naidu, *In re.*
Cr. R. C. No. 184 of 1952.
(Cr. R. P. No. 170 of 1952).

Madras Food Grains (*Intensive Procurement*) *Order* (1950), *clause* 10 (1)—*Sanction for prosecution for contravention of provisions—Essentials for validity.*

Clause 10 (1) of Madras Food Grains (Intensive Procurement) Order, 1950, does not prescribe any type, design form or particular form of words for a sanction for prosecution for contravention of any of the provisions of the Food Grains Procurement Order. All that the sanction must show is that all relevant materials were placed before the authority sanctioning the prosecution and that the authority considered those materials and that the order sanctioning the prosecution resulted therefrom. The sanction need not set out the reasons for the sanction. The object of clause 10 (1) is nothing more than a discouragement of frivolous, doubtful and impolitic prosecutions by low paid subordinates who might be actuated by several motives other than the interests of the public and the due enforcement of control orders. Where the sanction order by its preamble sets out all the materials which were before the Collector (sanctioning authority) and the order recites that these papers have been read by the Collector and then the decision of the Collector according sanction with all requisite details are set out, it is a valid sanction on the strength of which a prosecution will be sustainable. (1948) 1 M.L.J. 243 (P.C.); (1949) 1 M.L.J. 600; (1950) 1 M.L.J. 341, considered.

T. R. A. Ghani and *S. S. Bharadwaj* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. ——— *Conviction upheld and accused admonished.*

Subba Rao, J.
5th February, 1952.

Thiruvaduthurai Adheenakartha *v.* Bojaraja Naicker.
S. A. No. 1452 of 1948.

Religious Endowment—Permanent lease of property by manager—Suit for setting aside by succeeding manager—Limitation—Limitation Act (*IX of* 1908), *section* 10, *Articles* 134-*B*, 139 *and* 144—*Applicability.*

Section 10 of the Limitation Act will enable the manager of a temple or any religious institution to recover property alienated by his predecessor not for valuable consideration without any limit of time. But if he transferred the property without any necessity and for valuable consideration, the suit to recover the same would be governed by Article 134-B of the Limitation Act. Article 134-B applies both to absolute transfers and also to permanent leases. Though a permanent lease or a sale without necessity is invalid and not binding on the succeeding manager, it will enure during the tenure of the manager, who alienated the property. The succeeding manager can create a new lease, which likewise will enure during his lifetime. In the absence of evidence, it may be presumed that if a succeeding manager with the knowledge of the invalidity of the alienation received rents

he accepted the tenant as his tenant during the tenure of his office. But there may be circumstances which may establish that a succeeding manager has not accepted the tenant as his tenant for his lifetime but as one holding under the permanent tenancy, in which case the starting point of limitation prescribed by Article 134-B would not be postponed till after his lifetime. But Article 134-B cannot apply to a case where a tenant had acquired a right by prescription prior to the amending Act. To such a case Article 144 of the Limitation Act would apply but even so the aforesaid principles govern the situation. The tenant's adverse possession would start after the term of the alienor (manager) came to an end, unless his successor is presumed to have created a new tenancy to enure during his lifetime. Article 139 cannot obviously apply if Article 134-B applies. Article 134-B will not apply to a case where the tenant acquires an adverse interest prior to the amending Act. (On the facts the suit was found to be barred by limitation.)

K. P. Mahadeva Aiyar for Appellant.

K. S. Desikan for Respondents.

K.S.

Appeal dismissed.

Rajamannar, C.J. and Venkatarama Ayyar, J.
8th February, 1952.

Gopala Rao *v.* Kantam.
Appeal No. 186 of 1948.

Minor—Decree against—Guardian's failure to advance and establish defences—When gross negligence entitling the minor to get the decree set aside.

The fact that certain defences were raised by the guardian coupled with the fact that eventually the guardian (mother in the present case) did not adduce any evidence to try to establish those defences is not itself proof of negligence on the part of the guardian entitling the minor to have the decree set aside. If the guardian raises frivolous defences and subsequently is convinced that it was not worthwhile proceeding with those defences, it cannot be said that the guardian would be guilty of negligence. Before it can be held that the failure to defend is gross negligence the Court must be convinced that there were substantial defences to the action and nevertheless, the guardian failed to advance and establish them.

P. Chenchiah and *M. A. Narasayya Chowdari* for Appellants.

A. Sambasiva Rao and *T. Venkatadri* for Respondents.

K.S.

Appeal dismissed.

Rajamannar, C.J. and Venkatarama Ayyar, J.
4th March, 1952.

Luis Caetano Menzes *v.* The State of Madras.
C. M. P. No. 9092 of 1950.

Madras Prohibition Act (X of 1937)—Citizens of Portuguese settlements in India residing in Madras State—Right to issue of liquor permits.

Portuguese settlements in India though geographically situated in India must be treated as part of the territory of Portugal. Foreign nationals would include nationals of every foreign country and it is for the Government of the country concerned to decide who belonged to a particular nationality. It is not open to the Madras State Government to classify citizens of Portuguese settlements in India resident in Madras State, along with Indian citizens for purposes of issue of liquor permits under the Madras Prohibition Act. The only classification which will not offend Article 14 of the Constitution would be classification between Indian citizens on the one hand and foreign nationals on the other. Any other classification would be discriminatory. It is not open to the State Government to exclude the citizens of the French and Portuguese settlements in India from the general category of foreign nationals on the ground that the grant of permits to them might lead to abuse. A Portuguese subject born at Sholapur of parents both of whom were born in Goa and residing at Madras is therefore entitled to the grant of a permit as a foreign national.

E. S. Vaz, *P. M. V. Srinivasan* and *R. Natarajan* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) for the Government Pleader (*P. Satyanarayanaraju*) and *Narayanan Nair*, for the State Prosecutor on behalf of the Respondent.

K.S.

Directions given.

Ramaswami, J.
21st February, 1952.

Veera Raju *v.* Sundararamiah.
Cr.R.C. No. 1282 of 1950.
(Cr.R.P. No. 1211 of 1950.)

Criminal Procedure Code (V of 1898), *sections* 417, 423 *and* 439—*Scope—Powers of High Court in dealing with criminal revisions—Acquittal—Right to agitate against—Procedure.*

In regard to acquittal two remedies are open. Under section 417, Criminal Procedure Code, the State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. In such a case under section 423, Criminal Procedure Code, the High Court may in an appeal from an order of acquittal reverse such order and direct further enquiry to be made or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law. In such a case the Code makes no distinction between an appeal from an acquittal or an appeal from a conviction and in an appeal from an acquittal if the Court thinks that the lower Court has taken an erroneous view of the evidence it has jurisdiction to refuse to convict. The section gives full power to the High Court to review at large the evidence upon which an order of acquittal is founded and to reach the conclusion that upon that evidence an order of acquittal shall be reversed, the High Court has naturally to consider such matters as the view of the trial judge as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of the appellate Court in disturbing the findings of fact arrived at by a trial judge who had the advantage of seeing the witnesses.

But when the Local Government declines to appeal and a private party seeks to agitate against this acquittal it can only be under section 439, Criminal Procedure Code. Though sub-section (1) of section 439 authorises the High Court to exercise in its discretion, any of the powers conferred on a Court of appeal by section 423, sub-section (4) specifically excludes the power to convert a finding of acquittal into one of conviction. This does not mean that in dealing with a revision petition by a private party against an order of acquittal the High Court could in the absence of any error on a point of law reappraise the evidence and reverse the findings of fact on which the acquittal was based, provided only it stopped short of finding the accused guilty and passing sentence on him.

Logendranath Jha v. *Polai Lal*, (1951) S.C.J. 503 : (1951) 2 M.L.J. 288 (S.C.), relied on.

D. Narasaraju and *P. P. Surya Rao* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

S. Ramalinga Mudaliar for Respondent.

K.S.

Petition dismissed.

Govinda Menon and Krishnaswami Naidu, JJ.
14th March, 1952.

Seethamma *v.* Annapurnamma.
A. S. No. 726 of 1947.

Arbitration Act (X of 1940), *sections* 31 *and* 32—*Scope—Award made decree of Court, if can be set aside in a regular suit on the ground that the reference was procured by fraud and misrepresentation.*

Plaintiff filed a suit to set aside an award which was made a decree of Court, on the ground that the agreement to refer the disputes to an arbitrator was procured by fraud and misrepresentation :

Held, that the provisions of sections 31 and 32 of the Arbitration Act are a bar to a suit and that all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement should be determined in an application filed before the Court where the award has been or may be filed.

(1946) 1 M.L.J. 185 : I.L.R. 1946 Mad. 840; 53 C.W.N. 410, Referred to.

P. Somasundaram and *P. Suryanarayana* for Appellant.

M. S. Ramachandra Rao and *A.L. Narayana Rao* for Respondent.

K.S. *Appeal dismissed.*

Subba Rao, J.
14th March, 1952.

Harischandrudu *v.* Jagannadharao.
S. A. No. 69 of 1951.

Madras Agriculturists Relief Act (*IV of* 1938)—*Section* 8—*Explanation IV introduced by the Madras Act XXIV of* 1950—*Interpretation of.*

A Hindu father incurred a debt before 1st October, 1932 and after his death it was split up into three equal parts among his sons who executed three separate promissory notes on 15th November, 1935, in favour of the creditor. The creditor sued on foot of one of the promissory notes, and the debtor pleaded that the debt should be scaled down under section 8 of the Act applying the provisions of Explanation IV to section 8 introduced by the Amending Act of 1950.

Held, that if the debt was a separate debt of the father, Explanation IV applies as the sons would be heirs and legal representatives among whom the debt was split up. Held also, that even if the debt was a family debt and the same was split up among the family members, Explanation IV applies as the sons who divided the debt would be "assigns" of the debtor, *viz.*, the family, though not the heirs and legal representatives of the debtor.

M. S. Ramachandra Rao and *M. Krishna Rao* for Appellants.

P. V. Chalapathirao and *A. Triyambakam* for Respondent.

K.S. *Appeal allowed.*

Ramaswami, J.
18th March, 1952.

Narayanarao *v.* Ramaswami Ayyangar.
C.M.P. No. 2267 and 1727 of 1951
in S.R. Nos. 36226 and 36227 of 1951.

Limitation Act (*IX of* 1908), *section* 12—*Scope of*—*Time requisite for obtaining "judgment"*.

Where a petition to file an award and an application to set aside the award are disposed of by a comprehensive judgment in the former petition, and the judgment in the latter petition merely refers to the reasons given in the former judgment:

Held, in an appeal sought to be filed against the latter, the two judgments are required for filing the appeal, and the appellant is entitled to deduct the time taken in obtaining copies of both the judgments.

19 M.L.J. 10. (Notes of Recent Cases) and A.I.R. 1928 Lah. 755, followed.

M. S. Ramachandra Rao and *M. Krishna Rao* for Petitioner.

K.S. *Petition allowed.*

Rajamannar, C. J. and Venkatarama Ayyar, J. Ammennumma *v.* Beeviamma.
18th January, 1952. App. No. 491 of 1948.

Transfer of Property Act (IV of 1882), sections 67 and 100—Second suit for sale on mortgage or to enforce a charge—If maintainable—Civil Procedure Code (V of 1908), section 11—If bar.

A mortgagee has a right under section 67 of the Transfer of Property Act to file a suit for sale subject only to the conditions prescribed therein and of course, subject to the law of limitation and such a suit is not barred under section 11 of the Code of Civil Procedure by reason of a decree for sale passed on the same mortgage in a prior suit and under section 100 of the Transfer of Property Act the same principle applies to a second suit for sale to enforce a charge.

K. Kuttikrishna Menon and *T. C. Raghavan* for Appellant.

N. Sivaramakrishna Ayyar for Respondent. (*Amicus curiae*).

K.S. *Appeal allowed.*

Chandra Reddi and Ramaswami, JJ. Thirumaleshwara Bhatta *v.* Ganapayya.
24th January, 1952. S.A. Nos. 1823 and 2212 of 1947.

Hindu Law—Adoption by widower after he had re-married another woman—Deceased wife if can be nominated as adoptive mother to whose father the adopted boy can inherit.

It cannot be said that a Hindu has a right to name a non-existent deceased wife in preference to the existing living wife as the mother of the boy adopted by him, so as to entitle him to succeed to the estate of such predeceased wife's father.

65 M.L.J. 58 : 56 Mad. 759 (F.B.) *doubted.* (*Case-law discussed.*)

K. Bashyam and *M. L. Nayak* for Appellant in S.A. No. 1823 of 1947 and Respondent in S.A. No. 2212 of 1947.

K. Srinivasa Rao for Respondent in S.A. No. 1823 of 1947 and Appellant in S.A. No. 2212 of 1947.

K.S. *S.A. No. 1823 of 1947 dismissed and S.A. No. 2212 of 1947 allowed.*

Satyanarayana Rao, J. Thirumaleshwara Bhatta *v.* Govinda Bhatta.
4th February, 1952. Appeal No. 426 of 1948.

Provincial Insolvency Act (V of 1920), Section 28-A—Sale of Hindu insolvent father's property by Official Receiver before Amending Act—If conveys son's interest in the property.

In the absence of any specific language in the deed of sale by the Official Receiver (on the insolvency of a Hindu father) conveying the interest of the son in the property or in the absence of any other indication in the deed from which the intention to convey the larger estate (including son's share before the Amendment of the Act) could be gathered it is impossible to uphold that the deed vested in the purchaser not merely the share of the father but also the share of the son as well. The mere fact that the order of adjudication vested in the Official Receiver not only the share of the father but also the power of disposition possessed by the father over the son's share would not by itself convey to the auction-purchaser the share of the son unless there is indication in the document or in the sale proceedings that the Official Receiver in fact purported to exercise that power of sale and did in fact sell the son's share as well.

T. Krishna Rao for Appellant.

K. Y. Adiga and *K. P. Adiga* for Respondent.

K.S. *Appeal dismissed.*

Govinda Menon, J. State of Madras *v.* Subbaraju.
22nd February, 1952. S.A. No. 1691 of 1948.

Darkhast grant made by Collector as agent of Government—Finality—Government if can intervene—Board's Standing Orders—Scope.

The Government has not got any supervening power to interfere for whatever reason it may be, in the orders passed by the subordinate revenue authority in accordance with the provisions of Board's Standing Orders in the grant of darkhast.

Where the Collector has no power to cancel an order after it has become final, the Government itself has no power to cancel an order validly and duly made by the Collector. There is no provision for review or revision by the Government.

N. S. Srinivasan for the Government Pleader (*P. Satyanarayana Raju*) for the Appellant.

D. Narasaraju for the Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Govinda Menon and Panchapakesa Ayyar, JJ.
29th February, 1952.

Suryanarayanamurthi *v.* Venkata Syamala.
App. No. 463 of 1948.

Civil Procedure Code (V of 1908), Order 41, rule 22—Memorandum of cross-objections—When sustainable against co-respondents.

As a general rule, the respondent's right to urge in cross-objections should be limited to urging it against the appellant. But, in exceptional cases, a memorandum of cross-objections is maintainable even against the co-respondents, namely in cases where the questions in dispute cannot be disposed of completely without matters arising between co-respondents being reopened and reconsidered; no memorandum of cross-objections can be filed where the appellant has no interest at all.

I.L.R. (1950) Mad. 874 : (1950) 1 M.L.J. 54 (F.B.) relied on and other case-law discussed.

B. V. Subrahmanyam for Appellant.

K. Bhimasankaram, D. Narasaraju, V. V. Sastri, K. B. Krishnamurthi, N. Srinivasan and *S. T. L. K. V. Narayanachari* for Respondents.

K.S. ——— *Decree modified.*

Ramaswami, J.
29th February, 1952.

Moyankutty *v.* Narayanan Nair.
C.R.P. No. 1039 of 1951.

Civil Procedure Code (V of 1908), Order 6, rule 17—Amendment of plaint—Right to—Suit for recovery of possession of properties held under mortgage sued on and for arrears of purappad—Stay of suit on deposit of arrears of rent under Madras Act XVII of 1946—Application for amendment of plaint by giving up claim for recovery of possession and adding prayer for extinguishment of mortgage—Right to amendment.

The plaintiff filed a suit for recovery of possession of the properties held under a mortgage sued on. There was also a claim for arrears of purappad. Defendants 3 to 7 were said to be tenants in possession under the mortgagees. Defendants 1 and 2 deposited the arrears of rent claimed in the suit and the suit was stayed under Madras Act XVII of 1946. The plaintiff thereupon filed an amendment petition giving up the claim for recovery of possession of the plaint property and adding a prayer for the extinguishment of the mortgage. The defendants objected to the amendment being allowed on the ground that it was a ruse to deny them the rights conferred under Madras Act XVII of 1946 and the application for amendment was not *bona fide*.

Held: The motive with which the plaintiff filed the amendment application is neither here nor there. The amendment has to be allowed so long as the plaintiff is within his rights and does not take away any valuable rights which had accrued to the opposite party. It is open to a plaintiff to give up a portion of his claim and after amendment the suit will cease to be one for the recovery of possession and will not prejudice rights conferred by Madras Act XVII of 1946 or the later Acts enacted for the protection of tenants. In considering the question of allowing or disallowing the amendment the fact that plaintiffs giving up the claim to possession may lead to some other result in regard to stay is not a matter which ought to weigh. Nor can the Court consider the *bona fides* or *mala fides* of a petition for amendment so long as the amendment claimed is within the right of a plaintiff.

C. S. Swaminathan for Petitioner.

Respondent not represented.

K.S. ——— *Petition allowed.*

Subba Rao, J. Mohammad Usan Tharaganar *v.* Abusali Tharaganar.
28th February, 1952. S. A. No. 1834 of 1948.

Practice—Appeal—Appellate tribunal interfering with finding of trial Court arrived at on an appreciation of oral evidence—If contrary to law and open to second appeal.

It cannot be said that if an appellate tribunal interferes with the finding of the trial Court arrived at on an appreciation of the oral evidence, it is contrary to law and therefore a second appeal will lie.

Konda Kotayya and *S. Sitharama Aiyar* for Appellants.

S. Thiagaraja Aiyar and *G. R. Jagadisan* for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

Subba Rao, J. Hare Raujee Gore Shastry *v.* State of Madras.
4th March, 1952. W.P. No. 625 of 1951.

Land Acquisition Act (I of 1894)—Delegation of functions of Union Government (for acquisition of land for Union purposes) to the State Government—Validity—Constitution of India, 1950, *Article* 258.

In respect of acquisition of land for Union purposes (namely to house a Post office in the Madras State) a notification entrusting the functions of the Union Government to the State Government was held to be valid.

Obiter.—It is difficult to hold that the enquiry contemplated by section 5-A of the Land Acquisition Act is not of a quasi-judicial nature.

M. K. Nambiar and *C. F. Louis* for Petitioner.

Vepa P. Sarathi for the Government Pleader (*P. Satyanarayana Raju*) for Respondents.

K.S. ——— *Petition dismissed.*

Subba Rao, J. Purnama *v.* Venkata Subba Rao.
6th March, 1952. S. A. No. 1684 of 1948.

Licence—Defendant putting up boundary wall on plaintiff's site agreeing not to build over or project eaves over the wall—Acquiescence in the breach of the agreement and putting up of structures—Right of plaintiff to evict defendant.

A denial of title of the owner by the licensee did not entail forfeiture. Where the defendant has put up a boundary wall on plaintiff's site agreeing not to build over or project eaves over such wall but in breach of it built over the wall and the defendant acquiesced in it for over 25 years, the plaintiff is not entitled to the discretionary remedy of a mandatory injunction. The plaintiff can be ordered to be paid the value of the site giving defendant full rights in the site.

But the Court cannot compel the plaintiff to sell the site to the defendant and if plaintiff insisted on retaining title to the site the defendant should be liable to pay nominal damages for breaking one of the warranties in the agreement.

Ch. Suryanarayana and *Ch. Ramakrishna Rao* for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Subba Rao, J. Narayana Chandrasekhara Shenoy and brothers *v.* Palaniappa Mudaliar.
7th March, 1952. S. A. No. 1907 of 1948.

Contract—Agreement to supply jaggery free on railway at Karur to buyer in Calicut—Notification by Board of Revenue controlling movement by rail of jaggery from any station in Trichy District to Calicut—Buyer not willing to bear additional charge for transport by other means—Seller not delivering goods—If liable for breach of contract.

An agreement was made by the seller to supply jaggery to buyer at Calicut free on railway at Karur. The Board of Revenue having issued a press note

controlling movement by rail of jaggery from any station in Trichinopoly District to Calicut, correspondence ensued between buyer and seller, but seller was not willing to bear the additional costs of alternative transport.

Held, in the circumstances there was no breach of contract in not delivering the goods.

Quaere : Whether there was frustration by reason of impossibility of performance.

K. Sanjeevi Kamath for Appellant.

M. C. Srinivasan for Respondent. *Appeal dismissed.*

K.S.

Subba Rao, J. Sri Adikesava Perumal *v.* Kumara Thathachariar.
11th March, 1952. S. A. No. 1644 of 1948.

Temple—Right to build—When can be restrained by injunction—Quia Timet *action.*

Every one whether a private individual or a representative institution, is entitled to put up any building on his or its own land provided it does not interfere with the rights of his or its neighbours. So also any person can build a temple on his land and can utilise it in any manner without creating a nuisance to his neighbours. The only limitation is that by so constructing he should not cause material annoyance to his neighbours. But there may be circumstances where a Court may issue an injunction in a *quia timet* action to prevent a prospective nuisance if the threatened injury is imminent.

Where a temple is put up by a rival sect on neighbouring land belonging to them worship in the two temples at the same time with different rituals would certainly disturb worship in the existing temple and cause annoyance to worshippers therein. In a case where causing annoyance is certainly there, an injunction has to be issued.

K. E. Rajagopalachari for Appellant.

D. Ramaswami Aiyangar and *P. S. Srinivasadesikan* for Respondent.

K.S. *Appeal allowed in part. Leave granted.*

Mack and *Basheer Ahmed Sayeed, JJ.* Sanappa, *In re.*
11th March, 1952. R. T. No. 100 of 1951.

Criminal Trial—Appeal to High Court—Desirability of transferring accused to Madras Penitentiary and enabling him to instruct counsel in their appeals—Murder case—Investigating officer—If should examine accused in jail.

Facilities should be afforded to condemned prisoners to be detained in the Madras Penitentiary during the pendency of their appeals before the High Court to afford reasonable opportunity and access, subject to jail rules to defending counsel to interview the prisoners and obtain instructions in the further conduct of their cases.

Per *Basheer Ahmed Sayeed, J.* (differing from Mack, J.).—In regard to any appeal petition sent by any appellant in a referred trial or criminal appeal from jail, the necessity or otherwise of being acquainted with or making any use of such a petition should be entirely left to the discretion of the counsel concerned and in view of the experience that such petitions most often than not, do not render any assistance to the defending counsel no hard and fast rule can be laid down for observance by the counsel appearing for the appellants. There is no need for any new provisions in the Criminal Procedure Code to compel the investigating officer to examine the accused. If the officer feels the necessity to examine the accused at any stage before the charge sheet is laid, nothing prevents him from doing so, provided the purpose of such interrogation is to secure information as to the facts of the case. It is not necessary that the investigating officer should also examine

the accused even after the charge sheet has been laid so that he may investigate and verify any defence he might set up. After the charge sheet has been filed any defence that the accused might have can be placed before the Magistrate and decided upon. If the police is to be given an opportunity to examine the defence story of the accused and come to a decision thereon, it will not only be embarrassing to the police but such an opportunity is also liable to be abused by the investigating officers themselves.

V. V. Ramadurai for Accused.

V. Rajagopalachari, amicus curiae.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. *Sentence reversed and prisoner discharged.*

Somasundaram, J.
13th March, 1952.

Shanmugam, *In re.*
Cr.R.C. No. 909 of 1951.
(Cr.R.P. No. 894 of 1951.)

Madras Prohibition Act (X of 1937)—Prosecution for consuming liquor—Smell of arrack—Duty of prosecution to prove—Inference of guilt—When permissible from proof of smell alone.

In a prosecution for consuming arrack it is the duty of the prosecution to prove that the smell can come only from arrack, if the inference is to be drawn about consuming liquor from the smell alone. The other symptoms, like red eyes, talking at random, *et cetera* also must be proved to be due only to the effect of liquor. Where the evidence of the doctor shows that even if old sugar juice was taken, it may smell like arrack and the prosecution has not conclusively proved the smell to be that of arrack, a conviction and sentence will be unsustainable.

P. S. Chandrasekhara Iyer and *P. S. Ramachandran* for Petitioner.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

K.S. *Petition allowed.*

Somasundaram, J.
13th March, 1952.

Ramaswami Udayar *v.* Raju Udayar.
Crl. R. C. No. 331 of 1951.
(Crl. R. P. No. 330 of 1951.)

Penal Code (XLV of 1860), *section* 498—*Gist of offence.*

Section 498 of the Penal Code is intended to protect the husband and not intended for the benefit of the wife. It cannot be said that in a case where a woman is unwilling to live with her husband, may be even for good reasons, and she comes and lives with another person as husband and wife, the other person should not be held to have taken the wife within the meaning of section 498 of the Penal Code. The wife's complicity in the transaction is no more material on a charge under this section than it is on a charge of adultery. (Case-law discussed).

G. Gopalaswami for Petitioner.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

K.S. *Petition dismissed.*

Govinda Menon, J.
14th March, 1952.

Akhandala Kurup *v.* Damodara Kurup.
C.R.P. No. 1492 of 1951.

Court-Fees Act (VII of 1870), Section 7 (IV-A) and Article 17-B (Mad.)—Suit by a person eo nomine *party to an earlier partition ignoring that partition and asking or partition—Court-fee payable.*

In a suit for partition by a person who was *eo nomine* a party as minor represented by the guardian to an earlier partition deed ignoring such earlier partition,

the plaintiff if he had alleged in the plaint that he was in joint possession of any item of the joint family property along with other members, Article 17-B of the Court-Fees Act may be applicable. But where he makes no such allegation the plaintiff is not bound to set aside the earlier partition deed and section 7 (IV-A) of the Court-Fees Act is not an impediment to the valuing of the suit. (1943) 1 M.L.J. 249 and (1950) 1 M.L.J. 408 relied on; I.L.R. 1941 Lah. 308 considered. Other cases discussed.

K. N. Karunakaran for Petitioner.

A. K. Balakrishnan, S. M. Mohiuddin and *K. P. Ramakrishna Ayyar* for Respondents.

K.S. *Petition dismissed.*

Subba Rao, J.
17th March, 1952.

Subramania Iyer *v.* State of Madras.
C. M. P. No. 8308 of 1950.

Madras Estates Land (Reduction of Rent) Act (XXX of 1947)—Proceedings under—Prior decision by a tribunal that an inam village was not an estate as it was not a whole inam in proceedings under Madras Estates (Abolition and Conversion into Ryotwari) Act—If binding in subsequent proceedings.

A finding by the Estates Abolition tribunal in proceedings under Madras Estates Abolition Act that a village was not a whole inam village and therefore not an "estate," is binding in subsequent proceedings under the Madras Estates Land (Reduction of Rent) Act of 1947. Accordingly the Government has no power to notify that village under Madras Act XXX of 1947.

R. Kesava Aiyangar for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) on behalf of the State.

K.S. *Order quashed.*

Ramaswami, J.
24th March, 1952.

Umanatha Rao, *In re.*
Crl. R. C. No. 302 of 1952.
(Crl. R. P. No. 292 of 1952).

Criminal trial—Warrant cases and Sessious cases—Accused before they are charged anticipating defence by raising preliminary points—If can be allowed.

In warrant cases and *a fortiori* in Sessions cases accused persons before they are charged and put upon their defence cannot be allowed to anticipate their defence by raising preliminary points. When the Court passes judgment on these points they are brought up on revision to the High Court pending which the trial of the case is adjourned. This practice must not be permitted. An accused person has no right to raise a preliminary point before he is charged. He must wait to defend himself till he is charged and if he is convicted, his first remedy is in most cases by way of appeal.

Messrs. Row and Reddy for *S. Mohan Kumaramangalam* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. *Petition dismissed.*

Subba Rao, J. Subrahmanya Ayyar *v.* Govindaswami Moopanar.
26th February, 1952. S. A. No. 1343 of 1948.

Civil Procedure Code (*V of* 1908), *Order* 47, *rule* 8—*Scope of enquiry under.*

The words of Order 47, rule 8, of the Civil Procedure Code "may at once hear the case or make such order in regard to the rehearing as it thinks fit" are rather wide. The Court may, in exercise of the powers conferred under that section, not only give directions in regard to procedural matters but also can define the scope of the enquiry. It may, for instance, confine the scope of the rehearing to that part of the appeal or suit which was vitiated by the defect found or affected by the new evidence discovered. The discretion is vested in the Court directing rehearing, as otherwise on the pretext of an error on the face of the record affecting an insignificant part of the decree the entire trial sometimes covering a wide field and involving an examination of innumerable witnesses and a scrutiny of countless documents will have to be reheard, though the trial was otherwise free from any defect. It is unnecessary to attribute that intention to the Legislature, unless the clear words compel that conclusion. If the Court allowing a review petition does not restrict the scope of enquiry, it may reasonably be held that it intended to reopen the entire case.

G. R. Jagadisan for Appellant.

D. Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Respondents.

K.S. ——— *Appeal dismissed. Leave refused.*

Rajamannar, C.J. and
Venkatarama Ayyar, J.
28th February, 1952.

Ramayya *v.* Ramanna.
C. R. P. No. 1632 of 1948.

Madras Estates Land Act (*I of* 1908)—*Lands situated in a zeroyati village forming part of a permanently settled estate*—*If ceases to be such if obtained in exchange for lands in a pre-settlement minor inam*—*Suit to eject from*—*Jurisdiction.*

The character of lands which were situated in a zeroyati village forming part of a permanently settled estate, did not cease to be such even though they were obtained by the landholders in exchange for lands in a pre-settlement inam. Civil Courts have no jurisdiction to entertain a suit to eject tenants from such lands. The nature of the land did not change because of the exchange.

D. Narasaraju and *K. B. Krishnamurthi* for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S. ——— *Petition dismissed.*

(Full Bench)

Rajamannar, C.J., Chandra Reddi
and Venkatarama Ayyar, JJ.
7th March, 1952.

Subba Rao *v.* Chelamayya.
C. M. P. No. 7265 of 1951.

Civil Procedure Code (*V of* 1908), *sections* 109 *and* 110, *Order* 45, *rules* 2,3 *and* 8 *and Constitution of India, Article* 133—*Appeal to Supreme Court*—*If lies as of right where there is variation of decree on appeal by the High Court*—*Principles.*

If the judgment or decree of the High Court, varies the decision of the lower Court in respect of a matter in controversy in the proposed appeal to the Supreme Court, then there is a right of appeal not only to the person against whom the variation has been made, but even to the party in whose favour the variation has been made. But it is necessary that the matter in respect of which, there has been a variation should be the subject matter of the proposed appeal to the Supreme Court.

A matter in controversy cannot be split up or analysed or dissected into component parts or arbitrary divisions. The true test will be to determine the nature of the dispute or controversy.

If the matter in respect of which there has been a variation is not the subject-matter of the proposed appeal, then such variation would not confer a right of appeal. As regards matters unconnected with the matter in respect of which there

has been a variation *ex hypothesi* this will be the case when the variation has been completely in favour of the applicant.

If the requirements of pecuniary valuation are satisfied, an applicant is entitled as of right to leave to appeal to the Supreme Court if the decree of the Court of first instance is modified substantially by the decree of the High Court, where the matter in respect of which it has been modified is a matter in dispute before the Supreme Court, irrespective of the fact whether the modification is in favour of the applicant or not and although no substantial question of law is involved. But if the modification is in respect of a matter not comprised in the subject-matter still in dispute on appeal to the Supreme Court, the applicant is not entitled to leave as of right.

Ch. Sankara Sastri, Ch. Suryanarayana Rao and *Ch. Ramakrishna Rao* for Petitioner.

P. Satyanarayana Raju (The Government Pleader) for the Respondent.

K.S. ——— *Question answered.*

Somasundaram, J. Imam Sahib, *In re.*
14th March, 1952. Cr. R. C. No. 123 of 1951.
(Cr. R. P. No. 122 of 1951).

Criminal trial—Summons cases—Misjoinder—Vitiates trial.

The principle governing charges in warrant cases is equally applicable to summons cases. The provisions of section 233, Criminal Procedure Code, applies to summons cases also and misjoinder will vitiate the trial. Where however the offences were trivial and committed long ago, it was held that the ends of justice did not require that the accused should undergo separate trials for the offences.

G. Gopalaswamy for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. ——— *Further proceedings quashed.*

Somasundaram, J. Behara Latchanna Patnaik, *In re.*
14th March, 1952. Crl. R. C. No. 1100 of 1951.
(Crl. R. P. No. 1078 of 1951).

Madras General Sales Tax Act (*IX of* 1939), *section* 15 (b)—*Assessment to tax of firms—Prosecution against partners individually for default—Unsustainable.*

A prosecution for failure to pay the sales tax assessed against a firm cannot lie against the partners individually. As the defaulter is the firm, the firm should be prosecuted. A complaint can be laid against all the partners of the firm as such and they can be prosecuted for non-payment of tax.

C. V. Dikshitulu for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

K.S. ——— *Petition allowed.*

Somasundaram, J. Thirumalai Kolundu Thevar *v.* Subbiah Thevar.
18th March, 1952. Cr. R.C. No. 183 of 1951.
(Cr.R.P. No. 182 of 1951).

Penal Code (*XLV of* 1860), *section* 395—*Taluk Supply Officer taking bags of paddy suspecting them to be illicitly purchased by the accused—Accused believing* bona fide *that Taluk Supply Officer has no right to take them and getting the property back—If commits theft.*

Though the Taluk Supply Officer took certain bags of paddy suspecting them to be illicitly purchased by the accused in black market, still if the accused believed *bona fide* that the Taluk Supply Officer has no right to take them and got back the property in assertion of his *bona fide* rights, whatever offence he could have committed, he is not a thief and he cannot be convicted under section 395, Penal Code.

M. K. Nambiyar for Petitioners.

R. Santhanam for the Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. ——— *Accused acquitted of offence of theft and convicted under S.* 450, *Penal Code.*

Rajamannar, C.J. and Venkatarama Ayyar, J. 18*th March*, 1952.

The Management of Rajamani Transport, Ltd. *v.* The Workers employed in Rajamani Transport, Ltd.

W. P. No. 594 of 1951.

Industrial Disputes Act (*XIV of* 1947)—*Wages for different classes of workers—Criteria for fixing by Labour Appellate Tribunal and Industrial Tribunal.*

Whether or not a particular employer is able to make profits has no bearing on the question as to what is the proper wage for the different classes of workers in the business carried on by the employer company. A comparison of the rates obtaining in similar business in the locality is extremely useful in arriving at a proper basic wage. If after paying such wages the company is unable to make any profit that may be a consideration for the company deciding to wind up. But the apprehension that the company may have to close the business cannot affect the question what is the proper scale of pay having regard to relevant factors like the nature of the work done, the capacity of the particular class of industry to pay and other similar factors.

K. Veeraswami and *G. Ramanujam* for Petitioners.

V. V. Raghavan for the Government Pleader on behalf of the State.

S. Viswanathan for first Respondent.

K.S. ——— *Application dismissed.*

Rajamannar, C.J. and Venkatarama Ayyar, J. 20*th March*, 1952.

Venkatanarasayya *v.* The State of Madras.

C.M.P. No. 5671 of 1951.

Madras Estates (*Abolition and Conversion into Ryotwari*) *Act* (*XXVI of* 1948), *section* 9—*Question whether particular grant comprises less than a village and outside the scope of Act—Right of suit of aggrieved party—Writ of mandamus—Cannot issue.*

Where it is contended by a party that a grant in his favour comprised less than a village and therefore is not an "estate" still less an "under-tenure" within the meaning of the Madras Estates Land Act proceedings under section 9 of Madras Act XXVI of 1948 would not be strictly open to the aggrieved party. There is no other provision in that Act under which a special tribunal has been set up to decide such disputes. In such circumstances the aggrieved party will have a right of suit as he would have a good cause of action when proceedings are taken under colour of an Act which does not apply to the facts of the case. As the proper and adequate remedy is by way of a suit it is not necessary to invoke the jurisdiction of the High Court under Article 226 of the Constitution.

V. Vedantachari and *T. Rangaswami Aiyangar* for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Government Pleader (*P. Satyanarayana Raju*) for Respondent.

K.S. ——— *Application dismissed.*

Subba Rao, J. 21*st March*, 1952.

Gopalakrishnamurthi *v.* The Manager, Vuyyur Estate.

W.P. No. 352 of 1951.

Madras Estates (*Abolition and Conversion into Ryotwari*) *Act* (*XXVI of* 1948), *section* 57 (1) *and* (2) (*c*)—*Power to decide whether ryot or landholder is* prima facie *entitled to ryotwari patta or not—Delegation to manager—Power to be exercised judicially and after notice to party.*

The Government delegated their power to decide whether a *prima facie* case is made out for issuing ryotwari patta and the rules indicate that the said power should be exercised judicially. The word "Decide" and the right of appeal conferred against the order of the Manager of the estate are clear indications that the power should be exercised judicially. No judicial order could be passed without issuing notice to the parties affected. If no notice is given it is not possible for the aggrieved party to prefer an appeal within the prescribed time.

B. Manavala Chowdry for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) on behalf of Respondents.

K.S. ——— *Writ of mandamus issued.*

Somasundaram, J.
24th March, 1952.

Public Prosecutor *v.* Ponnu Kudumban.
Cr. R. C. No. 1175 of 1951.
(Cr. R. P. No. 1149 of 1951.)

Criminal trial—Case diary shown to Advocate for accused to enable him to cross-examine—Accused if can be compelled to apply for, furnish stamps and obtain copies—Criminal Rules of Practice (Madras), rule, 325—*Scope.*

Simply because the case diary was shown to the Advocate for the accused so that he can straightaway cross-examine the witnesses, without waiting for copies of it, it does not mean that the accused should be compelled to apply for it and furnish stamp papers or pay the prescribed charges. Whoever wants copies of any record, he must pay for it. If the accused do not want copies any more they cannot be compelled to pay for it and take those copies.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) in person.

S. Mohan Kumaramangalam for *Messrs. Row and Reddy* for Respondent.

K.S. — *Petition dismissed.*

Somasundaram, J.
25th March, 1952.

Ponnu Kudumban, *In re.*
C.M.P. No. 161 of 1952.

Criminal Procedure Code (*V of* 1898), *section* 196—*Taking cognizance—What constitutes.*

It is only when the Magistrate applies his mind for the purpose of proceeding in a particular way that is proceeding under section 200 and thereafter sending the case for inquiry and report under the subsequent sections he can be said to take cognizance of the offence. It is only when the final report as contemplated under section 173, Criminal Procedure Code, is made that is when a charge sheet is filed, it will be clear whether an offence has been committed or not, because by that time the investigation is completed and the entire material is disclosed by the particulars being mentioned in the charge sheet. Till then the Magistrate does not take cognizance. It cannot be said that when a preliminary charge sheet is filed the Magistrate takes cognizance. Only after final charge sheet was filed cognizance was really taken and if on that date sanction of the State Government as per the provisions of section 196, Criminal Procedure Code, was filed with the final charge sheet the committal on such charge cannot be quashed on the ground that the sanction was not filed with the preliminary charge.

S. Mohan Kumaramangalam for *Messrs. Row and Reddi* for Petitioners.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

K.S. — *Petition dismissed except as to accused Nos.* 70 *and* 71.

Somasundaram, J.
27th March, 1952.

Beyabani, *In re.*
Cr.M.P. Nos. 447 and 448 of 1952.

Madras District Police Act (*V of* 1861), *section* 53—*Scope—Limitation for prosecutions under—When applicable—Prosecution for desertion—Section if applicable—Section* 51—*If applies—Dismissal of accused—If bar to prosecution on same facts.*

What is contemplated under section 53 of the Madras District Police Act as a bar or limitation for the prosecution is the act done or intended to be done under the provisions of that Act or under the provisions of any other law. Where the complaint against an accused is not for anything done under the provisions of the Act or by virtue of any power conferred on him by the Act or any other Act, section 53 cannot apply and the question of limitation is not applicable to the case. It cannot be said that in view of the dismissal of the accused he ought not to be tried again for an offence and convicted. Section 51 of the Madras District Police Act will not apply to cases of dismiissal made departmentally by the Police.

Neti Subramanyam for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K.S. — *Petitions dismissed.*

Subba Rao, J.
28th March, 1952.

Kumarappa Chettiar *v.* The State of Madras.
C. M. P. No. 9495 of 1950.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—*Enquiry by Settlement Officer and decision that a village is not an inam estate—If can be treated as an estate under section* 3 (2) *of Madras Act XXX of* 1947 *and rent fixed.*

Inam villages granted, confirmed or recognised by the British Government are one of the categories of estates mentioned in section 3 (2) of the Madras Estates Land Act. Before the Madras Estates Land (Third Amendment) Act, 1936, for a village to come within the definition of an estate, it should be a village of which the land revenue alone has been granted in inam to a person not owning the kudiwaram thereof. Under the said amending Act, however, every inam village, whether only melwaram was granted or both the warams were granted is an estate. The Government confirmed or enfranchised some of those inams and issued title deeds to the grantees. Government having conferred title on the grantees in respect of those inams cannot retrace their steps or revoke the grant, except when the conditions of the grant are violated. They are the properties of the grantees. The Legislature passed Act XXVI of 1948, vesting the inam estates, that is, estates under section 3 (2) (*d*) of the Madras Estates Land Act before it was amended by the Madras Estates Land (Third Amendment) Act, 1936, in the Government. Under that Act limited jurisdiction is conferred on the Settlement Officer to ascertain whether a village is an inam estate for the application of that Act. He cannot clutch at jurisdiction by deciding wrongly that the inam is of a whole village. His decision is subject to an appeal to the Tribunal. The decision of the Tribunal in respect of the subject-matter within its jurisdiction is final and cannot also be questioned in other proceedings. But under the Act no power, either express or by necessary implication, is given to the Settlement Officer to revoke the title deeds legally issued by the Government. The legality of the title deeds is assumed. But under the Act the inam statutorily vests in the Government subject to their paying compensation to the landholders.

Accordingly the Settlement Officer cannot revoke the orders confirming the grants and issuing title deeds to the grantees. He is statutorily functioning with a limited jurisdiction. The order of the Settlement Officer holding the inam "as part of a village and therefore not an estate" is not binding on the Government functioning under Act XXX of 1947. It cannot be said that a notification under Act XXX of 1947 by the Government fixing the rent of such village is illegal though it may be advisable to withdraw such notification which is at variance with the order of the Settlement Officer. There is also an effective remedy by way of suit to the party aggrieved by the notification.

V. Vedantachari and *T. Rangaswami Aiyangar* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) on behalf of the State.

K.S. *Application dismissed.*

Subba Rao, J.
31st March, 1952.

Ramaswamy Gounder *v.* The State of Madras.
W. P. No. 116 of 1952.

Motor Vehicles Act (IV of 1939), *section* 43-*A—Scope—Notification by Government directing Regional Transport Authority to show preference to operators in the pre-war time—Validity.*

The Legislature enacted section 43-A of the Motor Vehicles Act empowering the Government to issue general directions in regard to matters relating to road

transport. The notification of the Madras Government directing the Regional Transport Authority to show preference to operators in the pre-war time for grant of bus route permits falls within the purview of the provisions of section 43-A of the Act and is valid. The scope of the section cannot be curtailed only to administrative functions and not to quasi judicial functions.

Miss Perween Amiruddin for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) for the Government Pleader and *M. K. Nambiar* and *N. G. Krishna Aiyangar* for Respondents.

K.S. *Application dismissed.*

Rajamannar, C.J. and Venkatarama Ayyar, J.
14*th April*, 1952.

Janardhana Krishna Ranga Rao *v.* The State of Madras and others.
C.M.P. No. 6554 of 1951.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), sections 45, 47 *and* 50—*Notification and taking over of impartible estate and deposit of advance, compensation amount—Maintenance holder if entitled to claim as member of joint family treating the compensation amount as joint family property and not as impartible property.*

A junior member entitled to maintenance out of an impartible estate has no right to the estate or the compensation paid on Government taking over the estate under the Madras Estates (Abolition and Conversion into Ryotwari) Act. The right to maintenance is not attributable to any present interest in the estate. When the estate is converted into money the custom of impartibility and its incidents will not cease to apply.

The material time for the purpose of determining the rights of parties would be the date of the notification by virtue of which the estate is statutorily transferred to the Government under the Madras Estates Abolition Act and at that time a junior member in an impartible estate has no subsisting and real interest in the estate except his right to get maintenance in accordance with the custom embodied in section 9 of the Madras Impartible Estates Act. His right of succession in certain contingencies cannot be treated as a right to a share in the property during the lifetime of the holder for the time being. If at the time of the notification the junior member did not have any right to a share in the corpus of the estate, then he cannot contend that after the notification and after the estate had vested in the Government he will have such a right. The question raised as to the validity of sections 45, 47 and 50 of Madras Estates Abolition Act not dealt with as unnecessary in view of the above decision.

K. Rajah Aiyar, D. Srinivasa Sarma and *C. H. Suryanarayana Rao* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) for the Government Pleader on behalf of the State.

N. Rajagopala Aiyangar and *Alladi Kuppuswami* for Respondents.

K.S. *Application dismissed.*

Subba Rao, J.
5th February, 1952.

Surya Rao Bahadur *v.* The Board of Revenue.
W. P. No. 796 of 1951.

Madras Estates Abolition Act (XXVI of 1948), *section* 18—*Portion of building used for a purpose other than as office—If vests on taking over of estate in Government.*

Building includes the site as well as the premises occupied as an appurtenance thereto, and the entire building so defined must have been used as an office. If any portion of the building was used immediately before the notified date for a purpose other than an office purpose, it would not vest in the Government.

Ch. Ramakrishna Rao for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for Respondent.

K.S. ——— *Petition dismissed.*

Satyanarayana Rao, J.
4th March, 1952.

Kotrayyar *v.* Gangamma.
Appeal No. 27 of 1949.

Arbitration Act (X of 1940), *sections* 32 *and* 33—*Scope—Plea raised in defence that it is barred by reason of the existence of arbitration award—If by itself renders suit unsustainable.*

Where a defendant contends that the suit is barred by reason of the existence of an award but it is found that the original arbitration agreement which was unstamped was not produced and therefore secondary evidence was inadmissible, there is no provable award which the Court could take notice of. It can preclude the plaintiff from suing only if really there was a legally provable award. It is open to the Court when the defendant raises the question that there was an award in defence to the plaintiff's case to consider whether there was really an award. It cannot be said that the suit was incompetent.

V. T. Rangaswami Aiyangar (The Public Prosecutor) and *K. Kalyanasundaram* for Appellant.

B. V. Ramanarasu for Respondent.

K.S. ——— *Appeal dismissed.*

Satyanarayana Rao, J.
14th March, 1952.

Narayana Shetty *v.* Aisamma.
Appeal No. 261 of 1947.

Pardanashin lady—Tests—Transaction by—How far binding on her—Undue influence—Extent necessary to vitiate transaction.

The expression "pardanashin" is applied to cases where the lady is always kept in complete seclusion. It is not enough that she wears burkha and does not usually appear in the public. It is not enough for a lady who claims to be a pardanashin women to establish that there was some sort of seclusion. If a woman, though observing gosha, comes to Court, gives evidence, fixes the rents and carries on business, there is no reason to regard her as a pardanashin lady entitled to advantage and protection which the law recognises and confers upon pardanashin ladies. Even in the case of a purchase from a pardanashin lady the only burden which the vendee has to discharge is to establish that in transferring the property the lady was a free and independent agent whether there had been independent advice or not. It is not necessary to establish that there was independent advice, if the Court is satisfied that the lady fully understood what she was doing when she executed the document.

To have a sale set aside on the ground that it was executed under undue influence it must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.

M. K. Nambiar for Appellant.

K. Y. Adiga and *K. P. Adiga* for Respondent.

K.S. ——— *Appeal allowed.*

NRC

Raghava Rao, J.
24th March, 1952.

Subramanyam Chettiar *v.* Isakki Ammal.
C.R.P. Nos. 2027 and 2028 of 1951.

Civil Procedure Code (*V of* 1908), *section* 115—*Revision—Costs ordered on allowing amendment of written statement—Inadequacy—Interference in revision.*

Where having regard to the nature of the stake an order for payment of costs of Rs. 5 only as condition for allowing amendment of a written statement is inadequate the High Court can interfere in revision with the order as to payment of Rs. 5 only as costs. [An order for payment of Rs. 100 as costs was substituted by the High Court.]

G. R. Jagadisa Aiyar for Petitioner.

S. Ramachandra Aiyar for Respondent.

K.S. ——— *Order varied.*

Rajamannar, C.J. and
Venkatarama Aiyar, J.
28th March, 1952.

Vakhan *v.* The Government of the Province of Madras.
Appeal No. 185 of 1950.

Madras General Sales Tax Act (*IX of* 1939), *before its amendment in* 1947 *and* 1949 —*Section* 2 (b)—*Dealer—Meaning—Person in Cochin State selling goods to residents in Cochin Fort—Liability to sales tax under the Madras Act.*

The plaintiff's principal place of business was in Palluruthy in the Cochin State and he was also a resident of that place. He had large dealings with European firms in Fort Cochin to whom he sold coir yarn. The contracts were mostly executed in Fort Cochin either by the plaintiff or his son. The goods were despatched from Palluruthy to Fort Cochin and delivered to the merchants in Fort Cochin. The plaintiff claimed that he was not a dealer assessable to sales tax in respect of his dealings as he had no place of business in British Cochin or the Province of India,

Held, (1) A person who is not a resident of a State cannot escape from or evade the imposition of taxes by the particular State if the necessary requirements are fulfilled which justify the levy of a tax.

(ii) On the facts the plaintiff must be held to be a person who carries on the business of buying or selling goods in the State of Madras and therefore a "dealer" within the meaning of section 2 (*b*) of the Madras General Sales Tax Act. The sales tax is a tax levied on the occasion of the sale of goods. The sales must in the instant case be deemed to have taken place in Fort Cochin which is a part of the State of Madras.

T. V. Muthukrishna Aiyar, N. R. Sesha Aiyar, C. T. Verghese and *A. V. Ramanatha Aiyar* for Appellant.

The Government Pleader (*P. Satyanarayana Raju*) and *V. Balakrishna Eradi* for Respondent.

K.S. ——— *Appeal dismissed.*

Govinda Menon and
Krishnaswami Nayudu, JJ.
31st March, 1952.

Dhanam *v.* Varadarajan.
Appeal No. 732 of 1948.

Hindu Women's Right to Property Act (*XVIII of* 1937) *before enactment of Madras Act* (*XXVI of* 1947)—*Leasehold and mortgage interest in Agricultural land—Widows not entitled to share in as the Act cannot affect agricultural property.*

Leasehold and mortgage interest in agricultural land in Madras Province will not come within the purview of Hindu Women's Right to Property Act, 1937, before the enactment of Madras Act XXVI of 1947 and such interest cannot be divided between the widows and coparceners. The fact that a debt can be assigned apart from the security would not make the mortgage any the less an interest in agricultural land. (Case law discussed).

G. R. Jagadisa Aiyar for Appellants.

S. Thyagaraja Aiyar for Respondents.

K.S. ——— *Appeal dismissed*

Somasundaram, J. The Public Prosecutor *v.* Kuncham Venkateswaralu.
1st April, 1952. Crl. Appeal No. 459 of 1951.

Madras General Sales Tax Act (*IX of* 1939), *section* 13—*Offence under*—*Essentials to be proved.*

For an offence under section 13 of the Madras General Sales Tax Act the prosecution must prove that the accused is a "registered" dealer within the meaning of the Act. Every assessee has to be a registered dealer but the Legislature have overlooked to say "registered" dealer in section 9. If an assessee has not registered himself, he may be punishable for that but not for not maintaining correct accounts which is an obligation cast on registered dealers only.

Adavi Rama Rao for Accused.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. *Appeal dismissed.*

Mack and Basheer Ahmed Sayeed, JJ. Molagan and others, *In re.*
4th April, 1952. Crl. Appeals Nos. 363 and 366 of 1951.

Criminal Procedure Code (*V of* 1898), *section* 173 (2)—*Scope*—*Permitting defence counsel to see portions of Police diary for use in defence of case*—*Desirability.*

Though an accused person is not entitled as of right to see the case diary and his statement to the police recorded in it there is no prohibition contained in section 173 (2) of the Code of Criminal Procedure against the Court permitting in its discretion defending counsel to see any portion of the case diary, which the Court considers in the interests of justice he should see and use in the defence of the case. There is no legal impediment to the committing Court permitting in its discretion and in appropriate cases defending counsel at his request to look into a case diary to verify what the accused told the police as recorded there, before formulating his defence, under section 172 (2), Criminal Procedure Code to aid the Court in the enquiry or trial. Under the law as it now stands such a permission cannot be claimed by the accused as a matter of right. It is comparatively of little use for defending counsel being permitted to look at the diary by the Sessions Judge at a belated stage of the trial. Defending counsel should know what the accused told the police in the first instance.

There is a heavy responsibility on the Courts in the user of case diaries under section 172 (2), Criminal Procedure Code and on Public Prosecutors to bring to the notice of the trial Judge anything in the case diary favourable to the accused.

V. Rajagopalachari and *E. Subramaniam* for accused 2 and 3 and *S. Chellaswami* amicus curiae for accused 1.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

K.S. *Conviction of first accused confirmed and conviction of other accused set aside.*

Rajamannar, C.J. and Venkatarama Aiyar, J. Ramamoorthy, *In re.*
7th April, 1952. W. P. No. 144 of 1952.

Constitution of India (1950), *Article* 226—*Powers under*—*Conditions necessary for exercise of.*

It is certainly not the province of the High Court to interfere *suo motu* or at the instance of any person whenever there is any disregard or violation of any of the provisions of the Constitution. The High Court's power under Article 226 of the Constitution can only be invoked at the instance of a person who has a personal grievance against any act of the State in its executive capacity which inflicts a legal injury on him. The right which is the foundation of a petition under Article 226 of the Constitution is a personal and individual right. The nomination of a member to the Madras Legislative Council by His Excellency the Governor of Madras in pursuance of Article 171, clauses (3) (*e*) and (5) of the Constitution

of India does not infringe the personal right of any elected member even in an indirect manner so as to entitle him to sustain an application for the issue of a writ of *certiorari* to quash the order of His Excellency the Governor. It cannot be said that it is incumbent on the Court to interfere *suo motu* in the matter and issue a writ of *certiorari*.

The Petitioner in person.

K.S. ——— *Application dismissed.*

Somasundaram, J.
9th April, 1952.

Subbayyamma *v.* Venkata Rao.
Crl. R. C. No. 1029 of 1951.
(Crl. R. P. No. 1010 of 1951.)

Criminal Procedure Code (V of 1898), *section* 488—*Claim by wife for maintenance—Allegation in defence that wife was living in adultery—Burden of proof—Party bound to begin the case.*

In a case of maintenance under section 488 of the Code of Criminal Procedure where the husband makes allegations that the wife was living in adultery and makes that his defence to refuse the claim of the wife for maintenance, the husband ought to begin the case and let in evidence of unchastity so that the wife may rebut it.

K. B. Krishnamoorthi for Petitioners.

C. V. Dikshitulu for Respondent.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. ——— *Case remanded.*

Somasundaram, J.
10th April, 1952.

The Public Prosecutor *v.* Swami Chetty.
Crl. Appeals Nos. 910, etc., of 1951.

Companies Act (VII of 1913), *sections* 76 *and* 131—*Offences under—Complaint for—*Locus standi *to make.*

With regard to offences under the Companies Act, there is no provision that any offence should not be taken cognizance of unless the complaint is filed by any of the persons mentioned in the Act. In the absence of such a provision the normal rule, namely, that any person may set the criminal law in motion will apply. No doubt in cases under Companies Act, it has been considered desirable that either the Registrar or Joint Registrar or officer concerned in dealing with the Act should prefer the complaint. The Regulations framed assigned the duty of making investigations into these matters to the above officers and directing them to file the complaint in such matters. But these regulations do not take away the right of any citizen to file a complaint under the Companies Act. In the absence of a special provision requiring that the complaint should be filed by a particular person, a complaint either by any citizen or a member of the company or by Assistant Registrar will be a valid complaint.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for Appellant.

P. C. Parthasarathi Aiyangar for Respondent.

K.S. ——— *Case remanded.*

Chandra Reddi, J.
15th May, 1952.

Chakkarai Chettiar, *In re.*
W. P. No. 430 of 1952.

Constitution of India (1950), *Article* 226—*Powers under*—Qua warranto—*Writ in the nature of*—Locus standi *to apply for issue of.*

The nomination of a member to the Madras Legislative Council by His Excellency the Governor of Madras in pursuance of Article 171, clauses (3) (*e*) and (5) of the Constitution of India does not infringe the personal right of any elected member and so long as such a member is not aggrieved by the nomination he is not entitled to question the validity of the nomination by a proceeding for information in the nature of a *quo warranto*.

S. Mohan Kumaramangalam for Petitioner.

K.S. ——— *Application dismissed.*

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